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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 165

CHARLES ROSENTHAL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

CHARLES ROSENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Charles Rosenthal prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming petitioner's conviction and sentence for conspiring* to violate the securities laws and to defraud the United States by impeding the functions of the Securities and Exchange Commission, and for the illegal sale of unregistered securities.**

Opinions Below

The opinion of the Court of Appeals, not yet reported, is reprinted in the Appendix (App. 1 36a).†

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* 18 U. S. C. § 371.

** 15 U. S. C. § 77e(a), (c), 77x and 18 U. S. C. § 2.

† Unless the context clearly indicates otherwise, references in parentheses are distinguished as follows: to the appendix of this petition, by App.; to the stenographic minutes of the trial, by plain numerals without prefix.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered judgment on March 17, 1964, and denied rehearing on April 10, 1964. By Order dated April 24, 1964, Mr. Justice John M. Harlan extended petitioner's time to file this petition to June 9, 1964. The jurisdiction of this Court is invoked under Title 28, §1254(1), United States Code.

Questions Presented

1. Whether petitioner Rosenthal's constitutional right to the effective assistance of counsel was violated when

(a) The trial court refused to permit him to retain counsel of his own choosing; and

(b) The trial court assigned petitioner counsel not only over his own vehement protests, but despite equally adamant objections by assigned counsel and counsel for co-defendants as well; and

(c) The assigned counsel represented co-defendants whose interests were in serious conflict with those of petitioner, which fact was brought to the trial court's attention immediately both by petitioner and by proposed counsel; and

(d) The co-defendants then represented by assigned counsel were never asked nor permitted to voice their views on whether they approved or disapproved of the assignment of their attorney to represent petitioner?

2. Whether petitioner was deprived of due process of law by the mass conspiracy trial which compelled him to run a gantlet of an 11-month trial when, by the prosecutor's admission, he could have been tried in less than a week?

A

Whether the Government intentionally and with calculated design to abridge petitioner's right to a fair trial opposed severance of petitioner's case so as to be able to introduce against him otherwise incompetent, immaterial and prejudicial evidence?

B

Whether the trial court abused its discretion in denying petitioner a severance and thus aided and abetted the prosecutor in waging a battle of attrition to harass and oppress petitioner and to link him with the major conspirators, despite his concededly insignificant role in the alleged transgressions?

3. Whether petitioner was deprived of his constitutional right to confront and examine witnesses or to compulsory process for obtaining witnesses in his favor, when the trial judge forbade any questioning of the witness Smith following his invocation of the Fifth Amendment privilege?

A

Whether the privilege against self-incrimination protects only the accused as the Fifth Amendment clearly indicates, or extends protection to any witness at all?

4. Whether the prosecutor and the trial court, in compelling petitioner to expend his entire personal fortune to defend himself in an 11-month trial, when without prejudice to the Government he could have been tried in less than a week, imposed upon petitioner cruel and unusual punishment or an excessive fine, in violation of the Eighth Amendment? (In effect, the requirement that petitioner participate in this battle of attrition meant that he would suffer irreparable financial ruin, whether he won or lost the case.)

5. Whether the rules permitting the Government to join petitioner in a mass conspiracy trial consuming over 11 months' time and to thus virtually ruin petitioner financially are, in effect, and as practiced, bills of attainder (Pains and Penalties), since petitioner was not entitled to determine whether he should be tried separately or jointly, it being a matter for the prosecutor and the court to determine?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the United States Constitution, Article 1, § 9 and Amendments V, VI, and VIII, and the statutes involved, namely, Rules 8 and 14, F. R. Cr. P., 15 U. S. C. §§ 77e(a)(1), 77x and 18 U. S. C. §§ 2, 371 are reprinted in the Appendix (App. 37-9a).

Statement of the Case

1. Proceedings Below.

The judgment of the Court of Appeals sought to be reviewed by this petition affirmed a judgment of conviction and sentence entered in the United States District Court for the Southern District of New York after trial before Herlands, J., and a jury. Jurisdiction is conferred on the District Court by 18 U. S. C. § 3231.

Petitioner was sentenced to four years imprisonment and fined $20,000 after a guilty verdict on a charge of conspiracy (18 U. S. C. § 371) to illegally sell unregistered stock to the public in violation of specified securities laws and to defraud the United States by impeding the functions of the Securities and Exchange Commission, and on two counts charging the illegal sale of unregistered stock in violation of 15 U. S. C. §§ 77e(a)(1), 77x and 18 U. S. C. § 2.

2. The Evidence.

As the Court of Appeal's opinion shows (App. 4-11a), the evidence adduced at the *11-month trial* involved primarily the intricate and fraudulent machinations of convicted embezzler Alexander L. Guterma. It shows that by the means of a "complex chain of [illegal] transactions" (App. 4a), including fraudulent mergers and related corporate lootings (e.g. Bon Ami), Guterma and his group created and acquired a half-million shares of stock in the United Dye and Chemical Corporation.

The evidence did *not* show, for the government did not attempt to prove, that petitioner took any part in those crimes, or that he had any stake in them (App. 17a). Rather, petitioner, who was allegedly a broker-dealer (App. 2a), was charged with having later joined the "multi-stage [Guterma] conspiracy" (App. 5a), for the purpose of distributing the unregistered stock to the public.

Thus, the evidence against petitioner, assuming its adequacy and viewed in a light most favorable to the government, showed that he embarked upon a later criminal venture of very definite limits. He was concerned, at most, with the sale of the Guterma group's unregistered control stock and with an incidental effort to manipulate the market price of that stock (App. 10-11a).

Although the government conceded that petitioner's first involvement with Guterma came after the fraudulent and criminal transactions by which the Guterma group acquired the United Dye stock, it contended that petitioner joined an existent "multi-stage conspiracy" in order to effectuate what it characterized as the last stage thereof, viz., to illegally sell the shares to the public. That the illegality of the means by which Guterma acquired the control stock was entirely irrelevant to petitioner's guilt or innocence of the crimes charged against him was deemed immaterial by the Court of Appeals (App. 17a). It held that the jury verdict on the conspiracy count was a finding

that the single conspiracy charged did exist (App. 5a, 17a) and that petitioner was not prejudiced by the introduction of highly inflammatory evidence concerning the crimes of others. It held that the broker-defendants' (including petitioner's) lack of complicity in, or even awareness of, the crimes attendant upon the acquisition of the control stock was immaterial.

3. The Trial and the Deprivation of Petitioner's Right to Due Process of Law.

Petitioner was one of 33 persons named as defendants in the complex indictment, which contained no less than 30 counts (App. 3a). On motion of the government, thirteen defendants were severed prior to trial. Eleven of those severed were salesmen in defendant brokerage firms, one was a defendant corporation, and another was a fugitive.* Thirteen other defendants pleaded guilty to parts of the indictment either prior to or during the trial. Of those who pleaded guilty, four were firms or corporations and seven were part of the "Guterma group." Another defendant, a corporation, was allowed to enter a plea of *nolo contendere* in the third month of trial, when, after its attorney was assigned to represent petitioner as well, it was discovered that a definite conflict of interest barred the joint representation (*infra*, pp. 8-10).

With the exceedingly high number of guilty pleas and severances prior to trial, all on motion of the government, the prosecutor was bent on trying the remaining defendants together. The trial judge ratified the prosecutor's choice by denying petitioner's motion for a severance.

The prosecutor, in oral argument on appeal, expressed the view that *petitioner could have been tried in four days' time*. However, the trial resulting in petitioner's conviction was a battle of attrition. By virtue of the prosecutor's opposition to petitioner's application for a severance,

* Another defendant was severed, when during trial, he suffered a stroke.

ratified by the trial judge, petitioner was forced to run the gantlet of *an over 11-month trial*, during which over 26,000 pages of testimony, colloquy and ancillary matters were recorded (App. 21-2a), by far the greater part of which had nothing whatever to do with the guilt or innocence of petitioner.

It was in this context that petitioner's lawyer, in the third month of trial, fell ill.

4. Petitioner's Lack of Assistance of Counsel.

If ever a case demanded the effective assistance of counsel, this case did. The trial court was vexed by the prolixity of the government's case, the overwhelming volume of exhibits, and the confusion wrought by the fact that, because of severances and pleas, only five of the thirty-three defendants participated in the trial to conclusion. Over 8800 pages, almost half of the entire record, is devoted to colloquy alone (App. 22a).

It was in this context that petitioner was forced to move the trial court for a continuance or a severance when his retained attorney became ill *in the third month of trial*.

Petitioner's lawyer fell ill on May 10, 1962. The trial judge immediately advised petitioner that he must obtain new counsel by May 16, 1962, five days later (5270-71, 5312-14). Despite the fact that both petitioner's lawyer's personal physician and a court assigned physician independently reported that he could resume participation at the trial within two weeks, the court refused to adjourn and directed that the trial resume on May 21, 1962 (5337-38, 5352).

Despite the fact that the six days given petitioner to obtain substitute counsel included a weekend, petitioner came forward with three attorneys (5308, 5321-2, 5343, 5369). However, none would step in to the trial on the 21st, each explaining that he required more time to read the over 5000 pages of record and study the intricate and

prolix indictment and proceedings—in short, to adequately prepare the case.*

Rather than wait an additional week for petitioner's lawyer to recover, or sever petitioner from trial,** the trial judge appointed Mr. Bobick, the attorney for co-defendants Cornelius DeVrodt and Cornelius DeVrodt, Inc., to represent petitioner.

As soon as Mr. Bobick had an opportunity to consult with Mr. Rosenthal, he informed the trial judge that he could not accept the assignment since the interests of his client were in conflict with those of petitioner.*** Bobick was adamant in his refusal to accept the assignment (5380):

> "I would say this, that the facts recited to me by Mr. Rosenthal are in *direct contradiction* to the facts I had given to me by my client, Mr. DeVrodt individually, who is still under indictment and may face trial in this case, and also in *direct violation* of what he told me was the situation so far as the corporation is concerned. And if the facts as related by Mr. Rosenthal are true, at that point I believe there would be a *direct conflict* [of interest] between both of them, yes, your Honor." (Emphasis Supplied)

Petitioner objected to the assignment of Mr. Bobick. He pointed out that, in addition to the fact that his interests were divergent from those of Mr. Bobick's other clients, he did not know Mr. Bobick so he lacked confidence in his "capabilities." He also was concerned with questions

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* The trial judge reported that other attorneys whom he had asked to represent petitioner begged off in view of the expected length of the trial (5360-1) (all such expectations were surpassed).

** There would have been no prejudice to the government by a severance. Petitioner could have been tried with other defendants as to whom a severance had been granted (*supra*, p. 6).

*** Mr. DeVrodt had earlier suffered a stroke and was severed from the case, but Mr. Bobick still represented him. DeVrodt, Inc. was a defendant in the case at trial.

of "personality" and their possible effect on the jury (5365-66).

An attorney from the office of one of the counsel chosen by petitioner, who had agreed to step in to trial on petitioner's behalf but who required more time to prepare than that allowed by the trial judge, argued (5379):

> "Well, I think, your Honor, that this is reasonably patent: One, the defendant has not chosen to be represented by Mr. Bobick; two, that Mr. Bobick, who is familiar with the facts of the case has spoken with this defendant and his own, declares that *there is a conflict*." (Emphasis Supplied)

Mr. Berman, who appeared *pro se* in his own defense, very cogently voiced his objections to the court's action (5392-93):

> "The objection is very simply this: In a conspiracy trial where a defendant hires his own attorney and is not represented by an attorney who represents several co-defendants, it is done for a *specific purpose*, to show that there is *no continuity* between the defendants or *no community* between the defendants. When the Court appoints a co-defendant's counsel to represent another co-defendant, *regardless of the instructions* it will give to the jury it is saying in effect these defendants have a community of interest which can be represented by one attorney.
>
> "This statement, as far as I am concerned, is *prejudicial* to every other defendant who sits here at counsel table, because you could have just as well appointed me, perhaps to represent Mr. Rosenthal as far as the jury is concerned, or you might have appointed Mr. Samuels to represent Mr. Rosenthal, or you might have appointed Mr. Fuller. You are then saying to the jury, regardless of your instructions, 'The defendants do have a community of interest.'
>
> "Now, this is a fact which *the government is supposed to prove* and is *not to be given to them by the Court*." (Emphasis Supplied.)

The objections fell on deaf ears, for the trial judge was anxious to resume trial. Although three months had elapsed from the commencement of trial, the trial judge afforded petitioner only six days, including a weekend, to find substitute counsel of his choice who would be willing to step into the trial, which was expected to, and did, last many more months, at the beginning of the following week.

Later in the trial the foreseeable happened. The conflict of interest between petitioner and his appointed lawyer's other clients became absolutely apparent and the trial judge was reluctantly forced to adjourn proceedings again. Finally, at the prosecutor's suggestion, he adopted the dubious remedy of allowing Mr. Bobick's corporate client to withdraw its plea of not guilty and to enter a plea of *nolo contendere* (16936-37).

5. The Deprivation of Petitioner's Right to Compulsory Process.

Sidney S. Barkley was the chief government witness against petitioner. He testified that petitioner hired some of the I. F. Stillman* salesmen (17300, 17345) and had lectured them on how to operate a "boiler-room" selling campaign (16710). He described petitioner as the "Fagin" who assured the salesmen that they could guarantee customers that the stock would close at a higher price for the day on the Exchange than that at which they purchased it over the counter (16171).

Significantly, Barkley, who had a criminal record, had pleaded guilty to one count of the indictment prior to trial (16673-74). He admitted that he was hopeful that, in exchange for his "cooperation" in testifying against petitioner, the government would not proceed against him on three other counts (17429-30).

Witness Milton D. Smith, named by Barkley as one of the salesmen whom petitioner had allegedly hired (17345),

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* I. F. Stillman, Inc. was an over-the-counter brokerage firm which had pleaded guilty to parts of the indictment prior to trial.

was subpoenaed as a witness by petitioner. He had been interviewed by petitioner's court-appointed lawyer a few days earlier and had answered prepared questions (23137-38) based upon Barkley's testimony against petitioner (23193-99). His answers prompted petitioner's lawyer to advise him that he would be called as petitioner's witness (23138).

Obviously, Smith was an important witness, for he could put the lie to Barkley's testimony and exonerate petitioner from guilt. However, upon the first question put to him by petitioner's attorney, he invoked the Fifth Amendment privilege against possible self-incrimination (23126). The prepared questions were read to the trial judge (23193-99) and it was shown, and conceded, that they involved the witness' activities in 1956 solely, as to which the statute of limitations had already run (23126, 23129, 23132). Nevertheless, the trial judge declined to direct the witness to answer on the theory that his answers might constitute a waiver of *his right to remain silent as to his later activities* under investigation in separate S. E. C. proceedings not related to I. F. Stillman and concerning which he was not going to be questioned by petitioner's lawyer (23162, 23168-70).

Petitioner then made application to put the prepared questions to the witness in the presence of the jury. The trial judge originally agreed to such procedure, advising petitioner's lawyer that it was his "responsibility." (23170). However, he later changed his mind and denied petitioner the right to question Smith in the presence of the jury (23202).

Reasons for Granting the Writ

1. Whether petitioner Rosenthal's Constitutional right to the effective assistance of counsel was violated when (a) the trial court refused to permit him to retain counsel of his own choosing; (b) the trial court assigned petitioner counsel not only over his own vehement protests, but despite equally adamant objections by assigned counsel and counsel for co-defendants as well; (c) the assigned counsel represented co-defendants whose interests were in serious conflict with those of petitioner, which fact was brought to the trial court's attention immediately by both petitioner and proposed counsel; and (c) the co-defendants then represented by assigned counsel were never asked nor permitted to voice their views on whether they approved or disapproved of the assignment of their attorney to represent petitioner?

The actions of the trial judge, when *in the third month of an 11-month trial*, petitioner's retained lawyer required a two week continuance due to illness, represent one of the most flagrant and audacious denials of the effective assistance of counsel ever to escape censure by a Court of Appeals. Rather than grant petitioner a severance* or a reasonable continuance to enable his lawyer to return, or substitute lawyers of his own choice to prepare, the trial judge saddled petitioner, against his will, over the vehement protests of assigned counsel, with the lawyer of two of his co-defendants and alleged "co-conspirators."

The justifications offered by the Court of Appeals (App. 33-4a) certainly are not sufficient.

That attorneys may become temporarily ill during the course of a year, especially when exposed to the physical exhaustion attendant upon trial duties, is hardly an unpredictable contingency. The question is raised whether the prosecutor and the trial judge did not assume the risk in foisting an over 11 month trial upon petitioner, especially

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* There could be no prejudice to the government by a severance for petitioner could have been tried with the other defendants as to whom a severance had already been granted (*supra*, p. 6).

in view of the prosecutor's concession that he could have been tried *in less than a week*.

The Court of Appeals states, presumably by way of partial justification for the actions of the trial judge, that petitioner "had a month's notice that his lawyer's health was questionable." (App. 33a) Perhaps the Court implies that petitioner's failure to obtain an additional, stand-by lawyer in some way authorized the trial court to compromise his right to counsel. Of course, the Sixth Amendment hardly tolerates such a notion. The impossible financial burden contemplated by the Court's implication—retaining two attorneys, rather than one, to devote a year's time to a trial—is too plain to question.

The Court states that petitioner only secured one substitute attorney, who was not "willing to proceed without an inordinate continuance . . ." (App. 33a).

Firstly, the Court of Appeals is factually incorrect. Petitioner came forward with *three attorneys* each of whom required more than the few days afforded by the trial judge for preparation (5308, 5321-2, 5343, 5361). Secondly, when petitioner's lawyer fell ill, over 5300 pages of testimony had already been recorded—an amount which exceeds that in many completed cases—and the trial was in its third month. In addition, the trial promised to, and did, drag on for many more months.

The trial judge's refusal, *under the circumstances*, to give petitioner more than four days, exclusive of a weekend, to obtain counsel of his choice, and equally arbitrary refusal to give new counsel more than five days to prepare, cannot be reconciled with the mandate of the Sixth Amendment.

As was stated by this Court in *Chandler* v. *Fretag*, 348 U. S. 3, 9-10 (1954):

> "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified . . .

> "A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."

If ever a case required the effective assistance of prepared counsel, this case did. Yet, the admonition of this Court that "'[t]he defendant needs counsel and counsel needs time'" (*Hauck* v. *Olson*, 326 U. S. 271, 278 (1945)) was simply paid lip-service by the trial judge.

That the Sixth Amendment requires that an accused be afforded adequate time, under all the circumstances, to obtain counsel of his choice, is settled. *Belford* v. *United States*, 288 F. 2d 298, 301 (CA 9, 1961); *Tinkle* v. *United States*, 254 F. 2d 23 (CA 8, 1958). That "counsel needs time" to prepare is also settled, for the Sixth Amendment contemplates the "effective" assistance of counsel. *United States* v. *Bergamo*, 154 F. 2d 31 (CA 3, 1946).

The trial judge's concern with "delay" which caused him to compromise petitioner's constitutional right, was, unfortunately, not abiding. The trial was almost half taken up with colloquy in which the trial judge took a most active part (App. 22a) causing the Court of Appeals to comment that "a tighter rein by the Judge would . . . have resulted in a materially shorter trial." (App. 23a) In any event, the trial judge's concern with delay, when petitioner, through no fault or choice of his, was without counsel, was most improper. It recalls the answer of the Eighth Circuit in *Tinkle*, *supra*, at 29:

> "Suggestion is made that delay would have been costly and disturbing to the government. There is no question but what delay would have been expensive, but Constitutional rights are not measured by the cost of prosecution. The trial court's ruling . . . is no answer to appellant's claimed denial of assistance of counsel."

The trial judge's impetuous and peremptory refusal to grant a reasonable continuance so that petitioner's lawyer

could return or, at least, so the substitute attorneys chosen by petitioner could adequately prepare to enter the excessively complicated and lengthy trial, cannot be countenanced.

Rather than sever petitioner or adjourn for the additional week that doctors deemed necessary for the recovery of his lawyer, the trial judge dealt with the problem by foisting upon petitioner unwanted counsel who had other clients in the case and who, himself, tried vainly to avoid the assignment.

It seems plain that the trial court never seriously believed that petitioner could secure substitute counsel who would be willing to enter the case with so little time to prepare. He suggested the possibility of appointing a co-defendant's attorney almost immediately after hearing of petitioner's lawyer's illness (527a, 77).

That a mere perfunctory effort to afford an accused his right to *prepared* counsel *of his choice* is not compliance with the constitutional mandate is settled. *Avery* v. *Alabama*, 308 U. S. 444 (1940); *Powell* v. *Alabama*, 287 U. S. 45, 59 (1932); *United States* v. *Johnston*, 318 F. 2d 288 (CA 6, 1963); *Tinkle* v. *United States*, *supra*; *United States* v. *Koplin*, 227 F. 2d 80 (CA 7, 1955).

The question is presented whether the trial judge's assignment of a co-defendant's lawyer to represent petitioner, under the circumstances presented in this case, was not merely a sham and not compliance with the Sixth Amendment.

In *Glasser* v. *United States*, 315 U. S. 60 (1942), this Court held to be inconsistent with the Sixth Amendment the assignment of a lawyer for one defendant in a conspiracy case to represent another. This Court held (at 70, 75-6):

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and

the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment . . . *so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests* . . .

. . . .

"*There is yet another consideration.* Glasser wished the benefit of the *undivided assistance of counsel of his own choice.* We think that *such a desire on the part of an accused should be respected. Irrespective of any conflict of interest,* the additional burden of representing another party may conceivably *impair counsel's effectiveness.*

"*To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of* [his lawyer] *as counsel for* [a co-defendant] *is at once difficult and unnecessary.* The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (Emphasis added.)

Most important, this Court there observed:

"In *conspiracy cases* [as here], where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, *it is especially important that he be given the benefit of the undivided assistance of his counsel without the court becoming a party to encroaching that assistance.*" (Emphasis added).

Thus, the broader question is also presented whether the Second Circuit rule that a court, even in a conspiracy case, may assign to a defendant the attorney for a co-defendant, where there appears to the trial judge "to be no conflict" is not an unauthorized departure from the decision of this Court in *Glasser, supra.*

The prejudice inherent in the assignment of a co-defendant's lawyer to represent an accused, against his will, especially in a conspiracy case, recognized by this Court in Glasser, took form in this case.

The Court's action in assigning petitioner's co-defendants' attorney to represent petitioner could not but give the jury the impression that there was a community of interest between them and Rosenthal—a fact which the prosecutor was required to prove, for this was a conspiracy prosecution.

Later, when one of the co-defendants changed his plea of innocence, the jury may have, even unconsciously, adopted the view that the plea was some evidence of petitioner's guilt.

That the trial judge gave appropriate instructions to the jury offers little comfort, for "[t]he naive assumption that the prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Kotteakos v. United States*, 328 U. S. 430, 453 (1946).

To what extent Mr. Bobbet's "freedom of mobility" was abridged by virtue of his joint representation is impossible to calculate. Whether he would have conducted his representation of petitioner's co-defendants' differently prior to his assignment as counsel for petitioner, had he had reason to anticipate the assignment, one may only guess. The necessary division of effort caused by a joint representation against the wishes of the attorney and his clients is obvious. Petitioner's unwanted new counsel, in addition to being hampered by his inability to prepare petitioner's defense in the depth which could be given had he not represented other defendants, did not enjoy the confidence which would have been his had petitioner retained him or wanted him.

Despite all these considerations, contemplated by this Court in *Glasser*, the trial judge deemed it adequate to af-

ford petitioner about ten days in which to retain a new lawyer *and* resume trial. Perhaps such a ruling would not be inconsistent with the Sixth Amendment in all cases. However, it seems plain that in a case of this duration and complexity, where the unavailability of chosen counsel was not attributable to the accused, such a ruling was absolutely violative of the Sixth Amendment. The utter disregard on the part of the trial judge of the effort which would need be expended by new counsel to familiarize himself with the over 5,000 pages of record, the 30-count indictment, and with his new client, so that a strategy for defense might be prepared, is shocking. The Court's unwillingness to sever as an alternative, especially in view of the fact that many defendants had already been severed, so that no possible prejudice to the government could arise, is similarly most disturbing.

When petitioner's co-defendants' lawyer was assigned to represent petitioner as well, *in the third month of trial*, he reported to the trial court:

> "Your Honor, may I advise the Court that *subsequent to the assignment by the Court* of myself as Mr. Rosenthal's counsel, I had *for the first time* the opportunity to speak with Mr. Rosenthal, which I did on Friday, and after speaking to Mr. Rosenthal, *I firmly believe in my mind that there is a conflict between De Vroedt, Inc. and Mr. Rosenthal.*" (5375)
>
> "I would say this, that *the facts recited to me by Mr. Rosenthal are in direct contradiction to the facts I had given to me by my client*, Mr. De Vroedt individually, who is still under indictment and may face trial in this case, *and also in direct violation of what he told me was the situation so far as the corporation is concerned.* And if the facts as related by Mr. Rosenthal are true, at that point I believe there would be a direct conflict between both of them." (5380)

The trial judge's eagerness to resume trial at all costs, despite the protests of assigned counsel and petitioner that a conflict of interests existed, later caused the Court to take

drastic measures to "patch up" this error as best it could. When the conflict of interest became so obvious that it could no longer be ignored, the court, at the prosecutor's instigation, adopted the questionable "solution" of allowing assigned counsel's other client, still in the case, to withdraw its plea of not guilty and to enter a plea of *nolo contendere*.*

The simple and obvious fact is that the trial court ran roughshod over petitioner's rights, with the apparent view to avoid inconvenience to the government, the court, and the co-defendants. The court did not even take the time to inquire of assigned counsel's other clients what their views were with respect to the proposed assignment.

Unlike the defendants in *United States* v. *Arlen*, 252 F. 2d 491, 494 (2d Cir. 1958), and *United States* v. *Benfremo*, 319 F. 2d 916, 936 (CA 2, 1963), cited by the Court of Appeals (App. 34a), petitioner here did not waive his right to counsel by manipulating that right for ulterior purposes, nor was petitioner afforded the six weeks given the defendant in the *Arlen* case.

The prejudice to petitioner is obvious. However, prejudice is irrelevant, for the right to counsel is "fundamental and absolute," and the courts will not indulge in "nice calculations" as to the amount of prejudice its denial entails. *Glasser* v. *United States*, *supra*, 76. Its fundamental and absolute nature should be reasserted here.

During the course of judicial history and experience one fact has emerged with absolute clarity—that in a criminal trial the accused's most important constitutional privilege may be his right to the effective assistance of counsel. Thus, Cooley, in his monumental treatise on the Constitution, observes:

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* Of course it is plain that Mr. Babick could not adequately and completely represent both his clients in negotiating with the government as to which of his clients should be allowed to change his plea.

> "Perhaps the privilege most important to the accused of crime, connected with his trial, is that to be defended by counsel." 1 Cooley, Const. Lim. (8th Ed.) 696.

More recently, Mr. Justice Douglas, quoting approvingly from a speech delivered by Mr. Justice Brennan, has concurred:

> "Without the help of a lawyer all other safeguards of a fair trial may be empty." 45 Minn. L. Rev. 693 (1961)

Repeatedly, and with increasing clarity, this Court has indicated that the right to the effective assistance of counsel, guaranteed by the Sixth Amendment, is the accused's most valued protection. It has stricken both federal and state convictions where the effective assistance of counsel has been abridged or denied.

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." Grosjean v. American Press Co., 297 U. S. 233, 243-244 (1936).

In *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938), this Court held void for lack of jurisdiction a conviction against an accused deprived of the effective assistance of counsel, stating:

> "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . *The Sixth Amendment stands as a constant admonition that if the constitutional safeguard it provides be lost, justice will not 'still be done.'*" (Emphasis added)

The admonition of the Sixth Amendment was quite forcefully demonstrated in the wake of this Court's land

mark decision in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) wherein the Court extended the protection of the Sixth Amendment by guaranteeing counsel to those accused in either capital or non-capital cases in state courts as well as federal courts.*

The important question is raised whether the trial court's actions in refusing to sever or continue the case for a reasonable period, and in assigning a co-defendant's lawyer to represent petitioner, over the protests of both petitioner and the lawyer, were not mere shams and not compliance with the constitutional mandate.

2. Whether petitioner was deprived of due process of law by the mass conspiracy trial which compelled him to run a gantlet of an 11-month trial when, by the prosecutor's admission, he could have been tried in less than a week?

A

Whether the Government intentionally and with calculated design to abridge petitioner's right to a fair trial opposed severance of petitioner's case so as to be able to introduce against him otherwise incompetent, immaterial and prejudicial evidence?

B

Whether the Trial Court abused its discretion in denying petitioner a severance and thus aided and abetted the prosecutor in waging a battle of attrition to harass and oppress petitioner and to link him with the major conspirators, despite his concededly insignificant role in the alleged transgressions?

Petitioner's guilt or innocence of the crimes charged against him depended upon whether he conspired to, and did, knowingly sell unregistered control stock of the United Dye and Chemical Corporation, and manipulate the price of that stock on the Exchange. The prosecutor expressed the view that petitioner could have been tried in four days.

* With the help of a court appointed lawyer [illegible] his innocence" to the Supreme Court. [illegible] Aug. 6, 1963, p. 21, col. 2.

time. Yet, despite timely applications for a severance, petitioner was forced into an 11-month trial best described as a battle of attrition. By far the greater part of the evidence involved crimes of co-conspirators no longer in the case and concerning which petitioner had no knowledge. The evidence also showed that he had absolutely no stake or complicity in those crimes—by which Guterma and his group looted public corporations and fraudulently created over a half-million shares of stock. Moreover, as the prosecutor's concession as to the length of time in which petitioner could have been tried recognizes, the illegal means by which the Guterma group created and acquired the control of stock was absolutely irrelevant to petitioner's guilt or innocence of the crimes with which he was charged—as irrelevant as would be proof that Guterma acquired the stock by robbing a bank.*

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* If this Court should grant certiorari, but ultimately decide the other questions raised against petitioner, a reversal of petitioner's conviction should result in any event, for it seems plain that the government failed to establish the existence of the single conspiracy charged in the indictment. As Judge Learned Hand held in *United States* v. *Peoni*, 100 F. 2d 401, 403 (CA 2, 1938):

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it * * *."

In *United States* v. *Falcone*, 109 F. 2d 579, 581 (CA 2, 1940), aff'd, 311 U. S. 205 (1940), he held that for one to join in the conspiracy of others:

> "* * * he must in some sense promote their venture himself, make it his own, have a stake in its outcome."

In *United States* v. *Andalaftch*, 112 F. 2d 503, 507 (CA 2, 1941), he warned:

> "It is true that at times courts have spoken as though, if A makes a criminal agreement with B, he becomes a party to any conspiracy into which B may enter, *or may have entered*, with third persons. That is of course an error; *the scope of the agreement actually made always measures the conspiracy*, and the fact that B engages in a conspiracy with others is as irrelevant as that he engages in any other crime." (Emphasis added.)

The question is squarely presented whether petitioner was deprived of due process of law, guaranteed by the Fifth Amendment, by the imposition of a mass conspiracy trial which compelled him to run the gantlet of an 11-month trial, when, in both the trial court's and the prosecutor's view, petitioner's involvement in the case was minor and he could have been tried in a "matter of four days." It would seem that in this day, when the mass conspiracy trial is more and more common, this important question in the administration of federal criminal law should be resolved by this Court.

The prosecutor, who in oral argument on appeal blandly conceded that petitioner could have been tried in a matter of four days, opposed all applications for a severance. He was bent upon "winning his case" and apparently felt that by trying petitioner with the "Guterma group" he would enhance his chances for "success." His bland concession, after conviction, as to the length of time in which petitioner could have been tried, can only be taken as some evidence of a deliberate and calculated design to adduce evidence against petitioner which otherwise would have been incompetent and inadmissible. The attempt to establish guilt by association in reliance upon the fact that, as this Court has already observed, it is "unmitigated fiction" to assume that instructions will repair the damage, was clearly violative of petitioner's constitutional right to a fair trial.

Since it is conceded that petitioner could have been tried in less than a week, it was "harassment" and "oppression" to compel him to run the gantlet of an 11-month proceeding wherein the evidence revealed enormous crimes with which it is conceded petitioner had absolutely nothing to do. The actions of the trial court and the prosecutor violated petitioner's right to a fair trial and traduced the spirit, if not the letter, of the decisions of this Court in *Pickingate v. United States*, 367 U. S. 556 (1961); *Abbate v. United States*, 359 U. S. 187 (1959); *Bartkus v. Illinois*, 359 U. S. 121 (1959) and *Cicci v. Illinois*, 356 U. S. 571 (1958). In each of those decisions this Court has expressed a senti-

ment which condemns the "oppressive use of the criminal trial" or official "harassment" for the purpose of gaining unfair advantage of a defendant. Although the cases cited involve harassment by multiple trials, it would seem plain that the principle may be applied to the case at bar. If, as is clear and as is conceded, petitioner could have been tried in less than a week, then to subject him to an 11-month trial, during which he could have been tried 44 times, is oppression of the first order.

> "This is an unseemly and oppressive use of a criminal trial which violates the concept of due process . . . whatever its ultimate scope is taken to be." *Cinco* v. *Illinois*, *supra*, at 575 (Douglas, J., dissenting.)
>
> "The prime consideration is the protection of the accused from the harassment . . . and not the justification for or policy behind the statutes violated by the accused." *Abbate* v. *United States*, *supra*, at p. 200 (Brennan, J.)

In his dissenting opinion in the *Piemonte* case, *supra*, at 564, Chief Justice Warren declared that unjustifiable harassment violated the Fifth Amendment.

That the Fifth Amendment does not tolerate what happened here seems to petitioner to be absolutely certain, for "a principle to be vital must be capable of wider application than the mischief which gave it birth," and "[i]n the application of a constitution . . . our contemplation cannot be only of what has been but of what may be." *Weems* v. *United States*, 217 U. S. 349, 373 (1910).

The caution of Judge Cooley, in his monumental work on the Constitution, is appropriate:

> "In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them *immense power for oppression;* and it is to *be feared* they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused . . ."

> "It is the *duty of the prosecuting attorney* to treat the accused with *judicial fairness*; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. *Unfortunately*, however, we sometimes meet with cases in which these officers appear to regard themselves *as the counsel for the complaining party rather than impartial representatives of public justice.*" 1 Cooley, Const. Lim. (8th Ed.) 646. (Emphasis added.)
>
> See: *Curtis* v. *State*, 6 Gold. 9.

Judge Learned Hand, in *United States* v. *Falcone*, 109 F. 2d 579, 581 (CA 2, 1940) aff'd 311 U. S. 205 (1940), aptly observed:

> ". . . today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are *opportunities of great oppression in such a doctrine is very plain*, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." (Emphasis added.)

Particularly when, after 50 trial days, petitioner's counsel became ill and petitioner renewed his motion for a severance, did the trial court have an affirmative "duty" to sever petitioner. Actually he should never have been joined in the trial at the outset. The conclusion is virtually irresistable that it was expected that he would, as did most others, agree to plead guilty to parts of the indictment against him. The lever employed by the government —its ability to prove to a jury his "guilt by association" at trial and to inflict upon him the financial ruin wrought in the wake of an over 11 month trial, cannot escape scrutiny by this Court. No jury could possibly be expected to separate and distinguish between evidence admissible as to one defendant and not another, or incriminating of one and not another, especially after an eleven month trial and a record exceeding 26,000 pages in length.

How could petitioner possibly have obtained a fair trial in the light of the foregoing facts, to say nothing of the other errors and the denial of his right to counsel? That instructions to a jury to disregard evidence is a fatuous and futile gesture has been repeatedly recognized.

> "The naive assumption that the prejudicial effects can be overcome by instructions to the jury, cf., Blumenthal *v.* United States, 332 U. S. 539, 559, 'all practicing lawyers know to be unmitigated fiction.'". Krulewitch *v.* United States, 336 U. S. 440, 453 (J. J.).
>
> ". . . the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." (L. Hand, J.) Nash *v.* United States, 54 F. 2d 1006, 1007 (C.A. 2, 1932).

Even the Court of Appeals below observed (App. 1287):

> "Those entrusted to make the laws have placed the crime of *conspiracy* on the books and it has not been repealed despite the fact that *throughout the ages* it has been largely responsible for multi-defendant trials and the *admission of evidence otherwise inadmissible.*" (Emphasis added)

That this trial was actually a battle of attrition is evidenced by the fact that of the 33 defendants named, only five participated in the trial to its conclusion. Thirteen defendants pleaded guilty before or during the trial.*

* The fact that 9 defendants pleaded guilty at various times *during* trial, coupled with the trial judge's "cautionary" instructions, itself made a fair trial impossible. One juror related, on voir dire, that he had read that 3 defendants pleaded guilty (1133-38). One defendant, who, during trial, pleaded guilty, took the witness stand for the government and told that he pleaded guilty (1548-96). The judge instructed the jury after the pleas were received that those defendants had been disposed of "with respect to their guilt on this indictment" (9646) and that their fate rested in his "hands" (9567, 9646, 14698). The Court of Appeals, while observing that "the jury could not have been unaware of these pleas" and that they constituted a "real danger" to other defendants, held that the trial judge's instructions and charge "met the law's protective requirements." If the Court of Appeals was correct, it would be salutary for this Court to review the adequacy of the law's "protective requirements."

It was therefore extremely urgent that the Court protect petitioner against prejudice and in this duty it erred in not granting a severance.

When the petitioner pleaded for a necessary and realistic adjournment to obtain counsel, the Court compromised his rights and relegated them to those of the other defendants who naturally objected to an adjournment.

The vice of the mass trial and the incredible 11 months it consumed is dramatically illustrated by the opinion of the Court below which continually pooh poohs errors on the ground that in the context of the very long trial they must be overlooked.

> "To set forth any detailed refutation of these charges might well require a restatement of the court's 450 page charge. Any such procedure would only add needlessly to the ever expanding law reports." (App. 23a)

But, why shouldn't the defendants be entitled to know how the Court decided their contentions? How can this Court possibly determine whether the petitioner received "due process" on his appeal? There are other instances where the Circuit Court "overlooked" error in deference to the length of trial.

In *Krulewitch* v. *United States*, *supra*, at 457, after a survey and criticism of the federal law of conspiracy, Justice Jackson declared:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. . . . And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the *purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.*" (Emphasis added)

One of Justice Jackson's criticisms of the federal law of conspiracy was that it reduced the Sixth Amendment right to trial to a sham. Referring to *Hyde* v. *United States*, 225 U. S. 347 (1912), he said (at 452-3):

> "Mr. Justice Holmes, 'on behalf of himself and Justices Hughes, Lurton and Lamar, wrote a vigorous protest which did not hesitate to brand the doctrine as oppressive and as "one of the wrongs that our forefathers meant to prevent."'"

In *Kotteakos* v. *United States*, 328 U. S. 750, 773 (1946), where, *as here, a single conspiracy was alleged, but multiple conspiracies were proved*, this Court, *reversing for this reason*, stated that the proceedings of a mass trial "are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass," and continued:

> ". . . . Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

Continued illustration of the ways in which the unnecessary 11 month trial prejudiced petitioner is unnecessary. The Court of Appeals' remark that the Court's charge to the jury consumed two days and over 950 pages of record (App. 23a) speaks for itself.

If ever a case epitomized the abusive employment of a mass conspiracy charge so that only a perversion of justice could result, this case does. It would be salutory for this Court to grant certiorari and review whether the Fifth Amendment tolerates what occurred here.

3. Whether petitioner was deprived of his constitutional right to confront and examine witnesses or to compulsory process for obtaining witnesses in his favor, when the trial judge forbade any questioning of the witness Smith following his invocation of the Fifth Amendment privilege?

A

Whether the privilege against self-incrimination protects only the accused as the Fifth Amendment clearly indicates, or extends protection to any witness at all?

Several important questions in the administration of federal criminal justice are raised by the trial judge's actions in allowing the witness Smith to invoke the Fifth Amendment privilege and in denying petitioner's application to put prepared questions to the witness in the presence of the jury.

The question arises at the outset whether a witness, as compared to an accused or one himself under investigation in the proceedings at hand, may properly invoke the privilege to remain silent.

The Fifth Amendment guarantees that:

> "No person . . . shall be compelled *in any criminal case* to be a witness *against himself* . . . ."

It is apparent that the language of the Constitution refers to an accused and not a witness.

> "Taken by themselves the words *nor can he be compelled to give evidence against himself* are, doubtless, broad enough to include a witness as well as an accused. But occurring in a sentence beginning with the words *in all capital or criminal prosecutions*, and sandwiched as they are between clauses which can only relate to the accused, they seem unmistakably intended to apply only to him: a conclusion which the word *he*, already used just a few words previously to refer unmistakably to the accused, strongly reinforces.
>
> . . . "Quite clearly, had the framers of these provisions intended them to include the witness, the

> fact that the context might be construed as negativing such a construction would have been apparent to them; and they would have rewritten the provision to remove the ambiguity.' One must conclude that the thought that the witness might be regarded as included never occurred to them. And the reason why it did not seems clear." Mayers, *Shall We Amend The Fifth Amendment* (1959) at 187.

In a footnote, the same author notes that the supposition that a "witness" as well as an accused is protected by its terms is probably owing to a misunderstanding of the Amendment:

> "It [the privilege against self-incrimination] was in fact unknown in the nineteenth century. It does not occur in either of the two historic Supreme Court decisions on the privilege toward the end of that century (the Boyd decision in 1886 and the Counselman decision in 1892). It does not occur in the 1891 edition of Story's *Commentaries on the Constitution* or in the 1893 edition of Greenleaf's *Evidence* – both standard works of the period."
>
> Mayers, id. at 311, 312 footnote 16.

Thus, in addition to the fact that petitioner was not given a severance and was not even afforded effective representation of counsel, the trial judge did not allow him to question the one witness who could have exculpated him entirely or at least attenuated the virulent effect of Barkley's testimony.

In light of the extraordinary hardship caused petitioner by such supposition in this case, the question is raised whether this Court should not grant certiorari and review this exceedingly important question in the administration of federal criminal justice.

Even if it be conceded that the priyilege against self-incrimination protects witnesses, other serious questions are raised by the trial court's actions.

In *United States* v. *St. Pierre*, 132 F. 2d 837, 840 (CA 2, 1942), Judge Learned Hand observed:

> "The result of using this, like any other privilege, is to deprive people of evidence which would be otherwise available; at best, a disastrous necessity, for disputes ought to be settled so far as they can by resort to the whole truth."

The privilege is designed and interpreted "to protect the innocent" even though it may prove "a shelter to the guilty." *Twining* v. *New Jersey*, 211 U. S. 78, 91 (1908).

Ironically, however, the privilege was perverted in this case and was applied in a manner clearly destructive of the policy behind it—the protection of the innocent. It barred petitioner from putting the lie to unfavorable evidence against him given by a witness with an obvious motive to seek to win favor with the prosecutor. Even if the witness had the privilege to invoke, the Court committed egregious error in denying petitioner the right to put the questions to the witness in the presence of the jury.

Petitioner did not intend to, and could not, abuse the opportunity to question the witness despite his expressed intention to invoke the Fifth Amendment. He only sought permission to put *prepared* questions to the witness, revealed to the trial judge, and already answered by the witness in a manner favorable to petitioner.

The trial judge acted on the erroneous premise that the Fifth Amendment prohibits inquiry. Thus he stated, in denying petitioner's application to put the question to the witness:

> "If your questions are improper in the light of what has developed then the jury is not entitled to consider the asking of the questions in its function as a deliberative body. The witness is excused." (23202)

However, the Court was plainly wrong. The questions to be put to the witness were entirely competent and relevant. The witness was merely privileged not to answer them—as probative as they were. Actually, "except in the case of an *accused* in a criminal case [for an accused cannot be called as a witness, the privilege against self-incrimination] is merely an option of refusal, not a prohibition of inquiry." 8 *Wigmore on Evidence* (3d Ed) § 2268, p. 402.

> "The right to trial by jury includes the right to have the jury present when competent questions are propounded to a witness. While a witness may refuse to answer if the answer would tend to incriminate him, yet the privilege does not bar the asking of the question." *O'Chiato* v. *People*, 214 Pac. 404, 405 (Sup. Ct., Colo., 1923). See also, *Hinds* v. *John Hancock Mutual Life Ins. Co.*, 155 A. 2d 721, 723 (Maine, 1959)

In *United States* v. *Benjamin*, 120 F. 2d 521 (CA 2, 1941), it was held that a witness, as compared to an accused, does not have the constitutional privilege of refusing to take the witness stand, but only the privilege of declining to give answers, when interrogated. Judge Augustus N. Hand, writing for the Court stated (at 522):

> "it is to be remembered that the appellant had not the constitutional privilege to refuse to testify which belongs to a defendant on trial. He was subject to call as a witness and only had the right of any witness to decline to give answers when interrogated which might tend to incriminate him. O'Connell *v.* United States, 2 Cir., 40 F. 2d 201, 205; Mullaney *v.* United States, 1 Cir., 79 F. 2d 566. As Professor Wigmore has said, the privilege is 'an option of refusal and not a prohibition of inquiry'. Wigmore, Evidence 2d Ed., § 2268."

Accord:

United States v. *Housing Foundation of America*, 176 F. 2d 665 (CA 3, 1949);

O'Connell v. *United States*, 40 F. 2d 201, 205 (CA 2, 1930);

United States v. *Miller*, 80 F. Supp. 979, 981 (E. D. Pa., 1948).

The Sixth Amendment again met with disfavor at the hands of the trial court. After depriving petitioner of his right to counsel, guaranteed thereby, he made empty petitioner's right to "compulsory process for obtaining witnesses in his favor." If the Court were obliged to balance the privilege of the witness under the Fifth Amendment with petitioner's right to process for obtaining witnesses in his favor, guaranteed by the Sixth Amendment, it should have at least afforded petitioner his right to put questions to the witness in front of the jury. The Court still could have enforced the witness' right not to answer, provided he invoked the privilege.

Rather than enable petitioner to impart to the jury the nature of the evidence which petitioner sought to present to it, petitioner's witness was dismissed by the Court with instructions that the jury was not to infer that the witness' reliance on the privilege was evidence *against* petitioner. Here, the Court

> "having put a man on trial perhaps for his life, permits the privilege [5th Amendment], historically developed for his protection in this very situation, to be perverted into a deadly weapon against him at the pleasure of a possibly hostile witness . . ." Mayers, *Shall We Amend the Fifth Amendment*, supra, p. 118.

By its action, the trial court also deprived petitioner of the right to inquire of the witness under oath whether his assertion of the Fifth Amendment privilege was in good faith. Perhaps it was induced by others. Barkley or perhaps his new-found friend, the prosecutor. By Barkley's testimony, Smith was a salesman in a brokerage house which had already pleaded guilty to the indictment. Other

salesmen of "United Dye" stock were still under indictment, having been severed prior to trial. Perhaps Smith, with prodding by no one, decided for himself, that it would be best not to goad the prosecutor by giving exculpatory evidence for petitioner.

The Ninth Circuit has recently suggested that to influence a person to assert the Fifth Amendment privilege is an obstruction of justice. *Cole* v. *United States*, 32 L. W. 2491 (CA 9, 1964). The Court held:

> "One who bribes, coerces, forces, or threatens a witness to claim it [the Fifth Amendment] or advises with corrupt motives the witness to take it, and does himself obstruct or influence the due administration of justice."

In addition to all this, it seems plain that the trial judge erred in allowing the witness to assert the privilege. The witness was sought to be asked questions concerning his activities in 1956, as to which the statute of limitations had run. The judge dismissed the witness on the erroneous theory that his giving testimony might constitute a waiver of his right to remain silent as to his later, unrelated activities under investigation by the S. E. C.

The awful abuse to which the Fifth Amendment was put in this case calls for corrective action by this Court.

4. Whether the prosecutor and the Trial Court, in compelling petitioner to expend his entire personal fortune to defend himself in an eleven-month trial when, without prejudice to the Government he could have been tried in less than a week, imposed upon petitioner cruel and unusual punishment or an excessive fine, in violation of the Eighth Amendment?

Despite the prosecutor's personal view that petitioner could have been tried in a matter of four days, he strenuously opposed petitioner's application for a severance and thereby caused petitioner to wage, as best he could, the battle of attrition which was the trial of the indictment. That petitioner's guilt or innocence of the crimes with

tioner. It has been stated by this Court (*Weems* v. *United States*, 217 U. S. 349, 368-9, 371, 373 (1910)) that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided. . . . What is understood by excessive fines? It lays with the court to determine . . . ."

Also:

> "The whole inhibition is against that which is excessive in the bail required or fine imposed, or punishment inflicted . . . We cannot think that the possibility of a 'coercive cruelty' being exercised through other forms of punishment was overlooked. We say 'coercive cruelty' because there was more to be considered than the ordinary criminal laws."

This Court also stated in *Weems*, *supra*, at 373, that:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, necessarily be confined to the form that evil had heretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."

And in *U. S. ex rel. Pitcher*, 101 F. Supp. 285, 288 (1951), the District Court of Alaska observed:

> "Reason, if not authority, indicates that the protection of the Eighth Amendment extends not only to those convicted, but to those held for trial . . . ."

The question is presented whether the government's choice to force petitioner to run the gantlet of an eleven-month trial when, concededly, he could have been tried in less than a week, is not the "infliction [of] injury at the expense of justice" which should prompt this Court, in the exercise of its supervisory function, to grant review. *McNabb* v. *United States*, 318 U. S. 332, 340.

It would seem that, if the government's actions with respect to petitioner be countenanced, an over-zealous prosecutor may inflict punishment upon one whom he merely suspects of a crime.

The language of this Court in *Weems*, *supra*, clearly offers reason for belief that the employment of an eleven-month mass conspiracy trial to exhaust a defendant physically and financially where he was able to be tried in a mere fraction of that time, is within the prohibition of the Eighth Amendment.

5. Whether the rules permitting the Government to join petitioner in a mass conspiracy trial consuming over eleven months' time and to thus virtually ruin petitioner financially are, in effect, and as practiced, bills of attainder (pains and penalties), since petitioner was not entitled to determine whether he should be tried separately or jointly, it being a matter for the prosecutor and the Court to determine?

Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, the prosecutor is empowered to join several defendants in an indictment or to consolidate indictments for trial. Only if a defendant is in a position to show inordinate legal "prejudice" and an "abuse of discretion" on the part of the trial judge is he entitled to a severance. *Pointer* v. *Arkansas*, 151 U. S. 396 (1894); *Stilson* v. *United States*, 250 U. S. 583 (1919). Unfortunately, the "extra-legal" prejudice caused petitioner by the joint trial below was not an element considered by the trial court in determining petitioner's application for severance. Moreover, petitioner was not entitled to insist, as of right, upon a special proceeding or trial, wherein his guilt could be individually tried.

The application of Rules 8 and 14 in this case had the effect of foisting petitioner into the horror of an eleven-month trial although, the government conceded, he could have been tried in less than a week. Petitioner's right to an appeal to test the propriety of the joinder or failure

to award a severance is meaningless, for the financial destruction, by then, is already achieved.

A Bill of Pains and Penalties is a legislative Act, without a judicial trial, which imposes a punishment less than death. Such Bills are within the constitutional prohibition against *Bills of Attainder*. *Dechmen v. State*, 8 Wall 595, 601; 16A C. J. S. Const. Law, p. 452, 455.

In *United States v. Lovett*, 328 U. S. 303, 322, this Court explained:

> "Bills of Attainder were part of what now are staple judicial function which legislatures then exercised. It was thus part of their recognized authority which the Constitution prohibited when it provided that 'No Bill of Attainder . . . shall be passed'".

In *Cummings v. Missouri*, 4 Wall 277, 320 (1866), this Court recognized that the deprivation of any right, social or political, formerly enjoyed by an individual, could be deemed a Bill of Attainder. The question is raised whether the infliction of financial ruin and deprivation of the right to earn a living through an unnecessarily protracted trial is not a "Bill of Attainder" violative of the Constitution.

The argument that expense and the deprivation of a right to earn a living is a necessary circumstance of any trial is not persuasive, for the eleven-month trial foisted upon petitioner was not a necessary circumstance. In *Cummings*, *supra*, at 320, this Court held that the "circumstances attending and causing" the deprivation are determinative.

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

"That Rule 8 and 14 are rules of procedure rather than substantive legislation, does not, as applied here, strip them of the character of "Bills of Attainder." If the Rules or

Criminal Procedure, may be employed to effectuate a destruction or confiscation of personal funds by foisting upon an accused an unnecessarily protracted mass trial, then corrective is necessary.

Conclusion

For the reasons stated above, and such additional reasons as may be advanced by other petitioners in this case, it is prayed that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit herein.

Respectfully submitted.

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 187—September Term, 1963
(Argued December 5, 1963 Decided March 17, 1964.)
Docket No. 28030

UNITED STATES OF AMERICA
Appellee,

—v.—

VIRGIL D. DARDI, ROBERT B. GRAVIS, CHARLES ROSENTHAL and CHARLES BERMAN,
Defendants-Appellants.

Before:

MOORE, FRIENDLY and KAUFMAN,
Circuit Judges.

Appeal by four defendants from judgments of the District Court for the Southern District of New York, entered after a jury trial, William B. Herlands, *Judge*, convicting them of conspiracy to sell unregistered securities in violation of 15 U. S. C. §§77(e)(a), e(c), q(a) and X, 78i(a), j(b) and ff(a), 18 U. S. C. §1341, Rules and Regulations Promulgated by the Securities and Exchange Commission, and to defraud the United States by impeding the function of the Securities and Exchange Commission; convicting Dardi of substantive counts under 15 U. S. C. § 78i(a)(2), (a)(6) and ff(a) and 18 U. S. C. §2; and, convicting Gravis, Rosenthal and Berman of substantive counts under 15 U. S. C. §§77e(a)(1), 77x and 18 U. S. C. §2.

Affirmed.

FELDMAN, KRAMER, BAM & NESSEN, New York, N. Y. (Maurice N. Nessen and Merton Sarnoff, of counsel), *for appellant, Virgil D. Dardi.*

IRWIN L. GERMAISE, New York, N. Y. (Bernard B. Polak, of counsel and Phillip C. Samuels, on the brief), *for appellant, Robert B. Gravis.*

JOHN A. VASSALLO, New York, N. Y., *for appellant, Charles Rosenthal.*

GALLOP CLIMENKO & GOULD, New York, N. Y. (Milton S. Gould and Jonathan W. Lubell, of counsel), *for appellant, Charles Berman.*

GERALD WALPIN (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Peter H. Morrison, Robert J. Geniesse and Gerald Abrams, Assistant United States Attorneys, of counsel), *for the United States of America.*

MOORE, *Circuit Judge:*

Four defendants, Virgil D. Dardi, Robert B. Gravis, Charles Rosenthal and Charles Berman, appeal from judgments of conviction that followed a jury verdict in which they were found guilty of unlawfully participating in the distribution of unregistered shares of United Dye and Chemical Corporation stock. Appellant Dardi was President and a Director of United Dye, a company long traded on the New York Stock Exchange. Appellants Berman, Gravis and Rosenthal were broker-dealers who dealt in the sale of stock in the over-the-counter market.

Opinion of the Court of Appeals

The Indictment

The indictment, which named thirty-three defendants and seventeen co-conspirators, contained thirty counts arranged in three general categories: Conspiracy (Count 1), market manipulation (Counts 2-5) and sale of unregistered securities (Counts 6-30). Because of severances and pleas of guilty, of the thirty-three defendants only the four appellants and one corporate defendant participated in the trial to its completion.[1]

Count 1 charged a conspiracy, 18 U. S. C. § 371, by Dardi, Berman, Gravis, Rosenthal and others illegally to sell unregistered United Dye stock to the public in violation of specified sections of the Securities Act of 1933 (15 U. S. C. §§ 77e(a), 77e(c), 77q(a), 77x), the Securities Exchange Act of 1934 (15 U. S. C. §§ 78i(a), 78j(b) and 77ff(a)), Rules and Regulations promulgated under both acts by the Securities and Exchange Commission, the Mail Fraud Statute (18 U. S. C. § 1341), and to defraud the United States by impeding the functions of the Securities and Exchange Commission (SEC). The methods used to obtain control of United Dye, the use made of other com

[1] Prior to trial, the following defendants were severed: I. Vincent Powell, Michael Kramer, Murray Porter, Edward Stone, Vincent P. Barry, Oscar L. Gould, Jacob Klein, Albert Wood Moore, Garry Hochman, Robert Allen and Charles Landeau, all characterized by the Government as "salesmen"; Defendants Louis Levin and G. F. Rothschild, Inc. were also severed prior to trial.

Four defendants entered pleas of guilty to portions of the indictment prior to trial: McGrath Securities Corporation (Counts 1, 6, 7, 8, 9, 17, 18 and 19); I. F. Stillman Inc. (Counts 1, 15, 27 and 28), Sidney Barkley (Count 1) and Irving Frank Stillman (Count 1).

Nine defendants pleaded guilty during trial: Samuel S. Garfield (Count 1); Allen K. Swann (Count 4); Allard Roen (Count 1); Herman W. Brann (Counts 4 and 5); Irving Pasternak (Counts 1, 6, 7, 8, 9, 20, 24, 27, 29 and 30); Garland L. Culpepper, Jr. (Counts 1 and 10); Rockwell Securities Corp. (Counts 1 and 10); Joseph Herbert Lederer (Count 1) and J. H. Lederer & Co. (Counts 1 and 30). Cornelius DeVroedt was severed due to illness; thereafter, Cornelius DeVroedt, Inc. entered a plea of *nolo contendere* to Counts 1, 24, 25 and 26.

panies such as Franklin County Coal Corporation and Handridge Oil Corporation, the illegal sale of unregistered stock and the illegal market manipulations were set forth in twelve detailed paragraphs and subparagraphs. The thirty-two overt acts alleged in the indictment included specific meetings and letters. Counts 2, 4 and 5 charged Dardi, Garfield, Pasternak and others with illegally pegging and stabilizing the price of United Dye stock on the New York Stock Exchange. In counts 6 through 30 the broker-dealers, Rosenthal, Berman, Gravis and others, were charged with the use of the mails in connection with specific sales of United Dye stock.

Each appellant was convicted on the first count. Dardi was convicted on each of three market manipulation counts under 15 U. S. C. § 78i(a)(2), (a)(6) and 78ff(a) and 18 U. S. C. § 2.[2] Berman, Gravis and Rosenthal were convicted on counts charging the illegal sale of unregistered United Dye stock in violation of 15 U. S. C. § 77e(a)(1), 77x and 18 U. S. C. § 2.[2]

I.

Outline of the Evidence.

As an overture to an analysis of the many legal and factual grounds urged for reversal, it is necessary to describe in brief outline the factual background against which the case must be viewed. The Government's case was constructed principally on the testimony of Alexander L. Guterma, the Chairman of the Board of United Dye and the central figure in the complex chain of transactions which he described to the jury. The Government alleged, and the

[2] The jury found Rosenthal not guilty on Count 15, Berman not guilty on Counts 14, 24, 25 and 26 and Gravis not guilty on Count 16. Defendant R. B. Gravis, Inc. was convicted on Counts 1 and 29, but found not guilty on Count 16.

jury must have found, the existence of a single multi-stage conspiracy which had as its central purpose distribution to the public of unregistered United Dye stock. In the preliminary stages of the scheme, the conspirators gained control of United Dye and created a corporation with which it was later merged, Handridge Oil Company. As a result of the Handridge-United Dye merger, the conspirators obtained 575,000 "control" shares of United Dye stock. Shortly thereafter, through manipulation of the market on the New York Stock Exchange and misleading and fraudulent statements to customers the shares were sold in the over-the-counter market without the registration required by the federal securities laws. A résumé of Guterma's testimony on direct examination supplies most of the details on which these ultimate facts were grounded.

Preparations for the Merger of United Dye and Handridge Oil

In June of 1955, Guterma joined defendants Samuel Garfield and Irving Pasternak in their efforts to acquire the Franklin County Coal Corporation. Guterma testified that his partnership with Garfield and Pasternak was for the purpose of merging Franklin, then owned by John and Clint Murchison, Jr., with a company listed on either the New York or American Stock Exchange and then selling the stock of the listed company as thus acquired. Franklin's two major assets, coal lands in Illinois, long inactive, and an oil pipeline in Wyoming, had been unable to muster a profitable return for several years. To effect the sale, Garfield and Pasternak gave their promissory note for $510,000 as the full purchase price, leaving the stock with the Murchisons as security. The only cash to change hands at this point was a loan of $300,000 from Garfield, Pasternak and Guterma to Franklin to redeem a like amount in mortgage debt to the Murchisons.

Since the Franklin stock was pledged with the Murchisons, and would be unavailable for a merger with a more substantial corporation, Guterma, Garfield and Pasternak found it necessary to improvise on their original plan. To this end Swann, their attorney, formed Handridge Oil Corporation to which Garfield and Pasternak conveyed their interest in Franklin. In exchange, the 500,000 shares of Handridge were transferred to Swann, "in trust" for the three partners. Guterma testified, however, that subsequently much of the Handridge stock was held by nominees, to disguise Guterma's, Garfield's and Pasternak's status as "control persons" under the 1933 Securities Act.

Meanwhile, Guterma had become acquainted with Dardi, already an officer and director of United Dye, and in the latter part of June, 1955, had agreed to purchase a block of 38,500 shares of United Dye stock through Dardi at ten dollars per share. There were at this time about 168,983 shares of United Dye outstanding. Soon thereafter, Guterma distributed about two-thirds of the 38,500 shares as follows: Pasternak, for himself and Garfield, bought 12,000 shares; 1,000 shares each went to co-conspirators Robert Eveleigh, a Guterma aide, and Robert Leonhardt, owner of McGrath Securities Corporation, a defendant brokerage house which was later to sell United Dye shares; and Dardi retained an option, later exercised, to buy 6,500 shares to complement the 17,700 shares he already held. By early September, 1955, Guterma had been elected Chairman of the Board, Dardi President, Eveleigh Treasurer, and Alexander Timm, one of Dardi's associates, Assistant Secretary.

While Guterma was establishing himself at United Dye, he discussed with Dardi the prospects of a merger between United Dye and Franklin County Coal. A committee of United Dye Directors, including Dardi, was appointed to look into the proposal. Originally, Guterma represented Franklin in the negotiations with the committee but when he became a director, he negotiated on behalf of United

Dye with Pasternak and Swann. The proposed merger was also discussed with the Committee on Stock Lists of the New York Stock Exchange, which eventually granted United Dye's application to list the additional shares to be issued in the merger. In early December 1955, a merger agreement was executed under which United Dye was to issue 575,000 shares of its stock (then selling at approximately $30 per share) in exchange for the 575,000 shares of Handridge. Handridge was required to have at the closing, in addition to unencumbered Franklin shares, $750,000 in cash. Guterma testified that this $750,000 actually came from the sale of 75,000 Handridge shares to, among others, United Dye directors, including Dardi, who concealed their ownership through an escrow agent.

To Guterma the then inflated price of United Dye stock was not conducive to execution of the merger, and he discussed the situation with Dardi and Hyman Lehrich, also an officer and director of United Dye, as well as with Garfield and Pasternak in October 1955. To meet the problem without running afoul of the securities laws governing the sale of control stock, Guterma and Pasternak entered into a series of "loan" agreements with various "borrowers," in fact nominees, who immediately sold the "borrowed" stock reaping substantial profits in the process. The Government also adduced evidence that coincident with the sales of Guterma and Pasternak, Dardi through nominees disposed of the 6,500 shares he had purchased from Guterma under the June 1955 agreement. The cumulative effect of the sale of substantially the whole 38,500 share block achieved the desired result of driving the price of United Dye from a high of $38 per share in November 1955 to approximately $16 on May 1, 1956 when the merger was to close.

Effectuation of the Merger of United Dye and Handridge

The merger agreement between United Dye and Handridge stipulated that Handridge was to own, at the date of the merger, the Franklin stock, then pledged with the Murchisons as security for Garfield and Pasternak's $510,000 note, free and clear. Garfield and Pasternak, according to Guterma, did not have the funds to pay off the note. Therefore, Guterma, Dardi, and Lehrich, in April 1956 caused the merger agreement to be modified to delete the free and clear requirement and to provide that United Dye would assume the note and that Garfield and Pasternak would pay United Dye $510,000 plus the $9,000 interest that had by then accrued.

Bon Ami

About this time Dardi learned that 63,000 shares of the Bon Ami Company, which had over $3,000,000 in liquid assets, were available for purchase. By May 1, 1956 Dardi had executed an agreement with certain Bon Ami stockholders which provided for United Dye's payment of $1,350,000 (to be borrowed from Guterma's F. L. Jacobs Corporation) and the delivery of its $350,000 promissory note in exchange for 63,000 Bon Ami shares.

Guterma testified that control of Bon Ami was acquired to enable Garfield and Pasternak to satisfy the $519,000 obligation owed by them to United Dye. Moreover, his testimony, as well as other evidence on this phase of the case, could well support the conclusion that the Bon Ami treasury after the merger was used to satisfy the obligations incurred by United Dye in the very process of acquiring its 63,000 Bon Ami shares. To substantiate Guterma's testimony, the Government introduced evidence of various "loan" transactions involving Garfield and Pasternak and, as Directors of Bon Ami, Guterma and Dardi. Immediately after the merger, the Bon Ami Executive Committee formed a subsidiary, B. A. Royal-

ties, Inc., which was used as a conduit for transferring $860,000 of Bon Ami funds to Garfield and Pasternak. Out of the $860,000 Garfield and Pasternak, by check back dated to May 1, 1956, paid $519,000 to United Dye in payment of their note to the Murchisons; and, at the same time, they transferred $140,000 to United Dye, purportedly as a loan. Subsequently, so that Bon Ami would be repaid, Bon Ami transferred to Diversified Oil & Mining Corporation (D. O. M.), recently organized and controlled by Guterma, Garfield and Pasternak, $1,250,000 in exchange for a similar amount in D. O. M. debentures secured by D. O. M.'s properties. The same day, D. O. M. transferred $915,000 to Garfield and Pasternak, purportedly in partial payment for oil properties, although those properties had been previously pledged to Bon Ami, and $250,000 to United Dye as a loan. From the $915,000 received from D. O. M., Garfield and Pasternak repaid the original $860,000 loan from Bon Ami. According to the Government, the final step in this series of transactions was the payment by United Dye of the obligations it had incurred in its purchase of Bon Ami, $1,700,000.

The Garfield and Pasternak Guarantee

Under the United Dye-Handridge merger agreement, Garfield and Pasternak had guaranteed that the Franklin pipeline would, for each of the years 1956 and 1957 receive a minimum profit before amortization and depreciation of $1,200,000. As security, Garfield and Pasternak pledged 85,000 United Dye shares they had received in the merger to United Dye. Less than two months after the merger, Guterma recommended to the United Dye Board that this guarantee be waived in return for a cash payment of $800,000. As it happened, according to Guterma, Garfield and Pasternak transferred to United Dye $450,000 in cash (obtained partially from United Dye and partially from D. O. M.) and 115,000 shares of D. O. M. stock, arbitrarily

valued at $250,000 although actually worth only $184,000. In return, they obtained the [redacted],000 shares, then worth $1,299,000, which could be sold in the forthcoming distribution.

Sales to the Public of United Dye Shares Issued in the Merger

The third objective of the Guterma-Garfield-Pasternak partnership was the sale to the public of 500,000 shares of United Dye, amounting to more than 50 per cent of the stock outstanding, acquired in the May 1956 merger. To avoid the practical and legal difficulties attendant upon the sale of such a large block on the New York Stock Exchange, the three partners had agreed to sell the shares in the over-the-counter market. It was at this point, during the summer of 1956, that the broker-dealers commenced their operations. While the United Dye stock was being stabilized artificially on the Stock Exchange, the broker-dealers (enlisted by Guterma), primarily by way of hard-selling long distance telephone calls and misleading tout sheets (so-called "boiler room" tactics), sold the stock to the public, knowing that no registration statement had been filed. The firms involved, including I. F. Stillman, Inc. (appellant Rosenthal), R. B. Gravis, Inc. (appellant Gravis) and C. F. Rothschild & Company (appellant Berman) were to be paid a fifteen per cent commission plus one dollar in cash for each share sold.

Stabilizing the Market

The success of the telephone sales campaign depended in large measure on the price at which United Dye was being traded on the stock exchange. To maintain the price, the shares sold initially over-the-counter had to be absorbed when offered on the Exchange. Consequently, Guterma made the necessary "pegging" arrangements with

his aid, Huges, defendant Brann, appellant Rosenthal, and defendant Sidney Barkley, Rosenthal's associate in I. F. Stillman & Co.

Before the merger, Guterma had instructed Hughes to watch the market price and to purchase any large amounts of United Dye stock for which there was no demand. Hughes complied by opening several brokerage accounts and purchasing in the name of relatives, friends and nominees. Hughes' efforts proved inadequate, however, when the boiler room sales began in earnest. To alleviate the problem, Dardi introduced Guterma to Brann who had expressed an interest in selling United Dye shares in Europe and in North Africa where he owned a bank. Brann could take advantage of 30 per cent margin, insure the anonymity of anyone conducting a market stabilization program, and tout the stock in his bank's market letter. An arrangement was agreed upon wherein Brann was to buy United Dye stock on the New York Exchange, the margin coming from Guterma, and then to sell the stock abroad. Although the Brann arrangement eventually bogged down as a result of Brann's alleged double dealing, the net result of the stabilizing efforts of Hughes, Brann, Rosenthal and Barkley proved successful.

The sales to the public and accompanying market manipulation, which lasted until early November 1956, completed the venture which Guterma, Garfield and Pasternak had undertaken a little over a year earlier, and in October they met at Clare, Michigan to discuss dividing the spoils amongst themselves. In April 1957 Guterma resigned from United Dye and began to sell the 83,000 shares he then owned. Dardi, according to Guterma, learned of these sales and, after reminding Guterma of Guterma's agreement to give him first preference, purchased 40,000 shares from Guterma at the then market price of $7.

II.

Sufficiency of the Evidence

Because a large portion of the errors asserted by appellants are bottomed on disputed questions of fact and sufficiency of proof, it is appropriate to advert to certain long established principles of appellate review. A jury of twelve has heard all the testimony, explanations of the meaning of a vast number of exhibits, and the exhaustive summations of counsel, and has been instructed on the applicable legal rules. Their verdict, after due consideration, was that appellants were, on the facts and the law, guilty of substantive crimes and of conspiracy. It was within the exclusive domain of the jury to choose between competing inferences of fact. *United States* v. *Gregorio*, 233 F. 2d 556, 563 (2d Cir. 1956), rev'd on other grounds, 353 U. S. 391 (1957). On appeal the evidence must be considered in a light most favorable to the Government. *United States* v. *Turino*, 269 F. 2d 488, 490 (2d Cir. 1959). Moreover, microscopic dissection of bits and pieces of evidence when laid out in a cold record overlooks the truism that "logically the sum if often greater than the aggregate of the parts, and the cumulation of instances . . . may have probative force immensely greater than any one of them alone." *United States* v. *White*, 124 F. 2d 181, 185 (2d Cir. 1941).

Substantive Counts (the Broker-Dealers)

The broker-appellants' convictions stem from their unlawful sales of unregistered stock. They do not dispute that they sold the stock or that it was not registered; rather, they claim that they were ignorant that the stock required registration at all. Section 5(a) of the Securities Act of 1933, 15 U. S. C. § 77e(a) sets up a general prohibition on

the sale of unregistered securities with certain exemptions.[3] No exemption is provided for an "underwriter" defined by the statute[4] as any person who offers or sells a security for an "issuer." An "issuer," in turn, is defined in terms of "control." Since the evidence clearly establishes that Guterma, Garfield and Pasternak were in "control," and since the broker-appellants sold for one or more such "issuers," each was an "underwriter" under the Act. See *United States* v. *Crosby*, 294 F. 2d 928, 939-40 (2d Cir. 1961), *cert. denied sub nom. Mittelman* v. *United States*, 368 U. S.

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[3] 15 U. S. C. § 77e(a) provides:

> Prohibitions relating to interstate commerce and the mails.
>
> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instrument of transportation, any such security for the purpose of sale or for delivery after sale.

[4] 15 U. S. C. § 77b(11) states:

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

984 (1962). Through this circuitous route it is apparent that the crucial issue as to the broker-dealers' guilt is whether they knew that they were selling for a "control" group. In *United States* v. *Crosby*, *supra*, this Court found that there was insufficient evidence that the broker-dealers "knew or should have known that they were 'underwriters' in terms of the Securities Act." The evidentiary problem here is whether the link missing in *Crosby* has been supplied.

Berman

Berman has energetically undertaken the task of explaining away all the undesirable inferences that can be drawn from the evidence adduced against him. A similarly meticulous analysis of various transactions and meetings was urged to the jury. We set out here a few of the facts from which the jury might have justifiably chosen to disregard Berman's explanations of his conduct. Berman came to Guterma and asked how many shares of United Dye were available and what the compensation was. He was told that about 150,000 shares "could be sort of held for him on an option basis." When Berman pressed for more, he was informed that any amount he could sell would be forthcoming and that "there was in excess of 200,000 to 250,000 available." When Berman asked of compensation, Guterma said that brokers were getting 15 per cent by check and $1 in cash per share. Guterma also told him that the stock should be sold for a specific amount at the closing New York Stock Exchange price. There was also evidence tending to show that six "vendor" letters, addressed to Garfield, Pasternak, Swaim and three others were all sent instead to Swaim, with whom Berman dealt, and that these letters were a subterfuge. Perhaps, even more damaging was Guterma's testimony that, when Berman expressed concern about the drop in United Dye price, Guterma replied that

all efforts were being made regarding market stabilization and that Berman should not be disturbed about it.

Berman argues that it was only logical to ask the chief executive of a corporation if large blocks of shares were available for sale; that in discussing market price with Guterma he hoped that as Chairman of the Board Guterma would influence the market through legitimate corporate actions, and that the only inference that can be drawn from the "vendor" letters is that copies were sent to Swann in his representative capacity. Whatever the various inferences it *might* have drawn, the jury heard Berman's explanation of his conduct and discredited it. The evidence presented describing the circumstances of Berman's participation in the distribution is sufficient to support the jury's conclusion that he knew that his sales were for a control group.

Berman also asserts his good faith reliance on legal opinions that the stock was tradeable without registration, as did the broker-dealers in *United States* v. *Crosby*, *supra*. The *Crosby* case makes it clear, however, that reliance on the opinion of counsel is but one consideration which may be persuasive in the jury's determination of the defendant's state of mind. Among other factors which the jury could consider as going to Berman's good faith reliance on legal advice was the fact that the letters expressing the opinion that the stock could be sold without registration specifically made the assumption that the sales were not being made for "control" persons. And, as pointed out, the jury could have inferred that when these opinions were rendered Berman knew that he was dealing with control persons.

Gravis

Gravis first expressed his interest in selling United Dye to Hughes, who arranged a meeting with Guterma. Guterma told Gravis that the amount of available shares was in ex-

cess of one-half million, and assured him that these shares would not be sold on the Exchange so as to undercut the price. Guterma further informed Gravis that he could acquire shares for distribution, and that "the brokers" were receiving 15 per cent commission by check and $1 in cash. There was also evidence that Gravis was one of the brokers who sent periodic "confirmations" of sales to Hughes at United Dye. Finally there was evidence that Gravis made false statements to SEC Investigator Pitchardo from which the jury might have concluded that Gravis knew full well that his sales were unlawful and that Guterma was in a control position.

Rosenthal

Guterma's testimony alone provides a sufficient basis on which the jury could have decided that Rosenthal knew he was selling for Guterma and his control group. Guterma told Rosenthal that he (Guterma) and his "associates," Garfield, Pasternak, Swann and others, wanted to sell United Dye shares in the over-the-counter market. He further informed Rosenthal that the group controlled a total of approximately 550,000 shares and that "substantially all of these shares would be sold." In addition, testimony of Barkley, Rosenthal's former partner, was that he and Rosenthal had actively engaged in market "pegging" while the United Dye shares were being retailed, under Guterma's supervision.

The Conspiracy Count

The broker appellants make the complaint that the Government failed to prove the single conspiracy alleged in Count 1; that the proof showed that any conspiracy to sell securities to the public was independent of a separate and prior conspiracy involving the creation of the shares and their distribution to the co-conspirators and nominees. The

prejudicial effect of the mass of evidence introduced as to the activities of Guterma and his "executive" group, it is argued requires reversal on the substantive counts as well as the conspiracy count.

As was recently said in *United States* v. *Crosby*, *supra*, at 945, "'whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement.'" In the case at bar the jury was so instructed.

There was abundant evidence to show the complicity of Guterma, Garfield and Pasternak, among others, in one plan consisting of a progression of carefully related transactions which had as its ultimate purpose the sale to the public of unregistered stock. Indeed, Guterma testified that this was precisely what his venture with Garfield and Pasternak was all about. But it is not fatal that the broker-appellants were not shown to have been aware of each part of the unlawful plan. See *United States* v. *Benjamin*, — F. 2d — (2d Cir. 1964); *United States* v. *Crosby*, *supra* at 945; *United States* v. *Aquesi*, 310 F. 2d 817 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963). It is only necessary to show that appellants knew of the conspiracy and that they associated themselves with it. *United States* v. *Beatrea*, 319 F. 2d 916, 928 (2d Cir. 1963), *cert. denied*, 32 U. S. L. Week 3212 (U. S. Dec. 10, 1963), *United States* v. *Aviles*, 274 F. 2d 179 (2d Cir. 1959), *cert. denied*, *sub nom. Genovese* v. *United States*, 362 U. S. 974 (1960).

We must conclude that there was sufficient evidence from which the jury could find that the broker-appellants knew that Guterma represented a control group acting in concert for the purpose of selling to the public unregistered stock. Upon the facts here, the sufficiency of the proof on the conspiracy count is bolstered by the determination of the adequacy of proof on the substantive count. See *United States* v. *Crosby*, *supra*, at 940.

III.

Conduct of the Trial

Dardi, apart from points dealing with claims of specific evidentiary errors, asserts that he was denied a fair trial (1) because of the trial court's failure to grant proper and timely pre-trial production of documents and a bill of particulars; (2) because of the extended duration of the trial and the court's toleration of "colloquy"; (3) because of the charge; and (4) because of unfair and discriminatory treatment by the trial court.[5]

Pre-Trial

Probably no experienced trial counsel has ever commenced a trial feeling that every necessary item had been fully and adequately prepared and that nothing remained to be done during the trial. If so, it is an experience enjoyed by very few. The usual pattern, particularly in the complicated and protracted case, is to spend most of the time after daily recess preparing for the morrow. And certain it is that trial counsel, if worthy of the title, never are satisfied that all possibilities of law and fact have been explored and that all the arguments essential to victory have been made. Limitations of time, space and the finite mind apply even to lawyers and it is against the background of this unfortunate but actual limitation that this trial must be viewed.

The indictment was filed on July 14, 1961. It was by no means in skeleton form. The conspiracy was alleged in detail and thirty-two overt acts were set forth. The particular statutes claimed to have been violated were set forth. The nature of the conspiracy, namely, the sale of unregistered stock; the rigging of the market and the fraudulent

[5] The other appellants join in these contentions.

sale to the public were alleged not in generalities but with reference to the specific means used for these purposes. The substantive counts dealing with market manipulation and sale were equally definite. Surely these appellants were adequately informed of the charges against them.

They complain, however, that they were not allowed sufficient pre-trial discovery and inspection and a detailed bill of particulars. In September 1961 defense counsel filed their motions for discovery and particulars. In December a single judge was appointed before whom all matters were to be heard. Early in February 1962 the court denied the motions. This denial, however, did not cut off the defense from information. On February 8, 1962 the Government served an eight-page bill of particulars and offered to make available some sixty-eight categories of documents. Pre-trial conferences were held during February with the not unusual result of the Government claiming that it was being over-liberal in its disclosures and the defense contending either that if was not enough or too much to be encompassed before the commencement of the trial. It was at this point that the trial court, faced with the necessity of commencing the trial at some time, made the suggestion that defense counsel could prepare as the case went along. No inference can be drawn from this remark that defense counsel approached the day of trial completely unprepared and that the trial court callously told them to prepare as they went along. They had been aware of the charges against their clients for some eight months. Their motions, the pre-trial conferences, the "minutiae" in the Government's bill of particulars, of which they now complain, all refute their present claim.

Even after the commencement of the trial (February 27, 1962) defense counsel had many opportunities for further preparation usually not afforded in the average trial. The Government's case was presented in substantial part

through Guterma whose testimony commenced on March 9, 1962. A week's adjournment, caused by a defendant's illness, occurred between March 13th and 20th. The first occasion for cross-examination by any of appellant's counsel did not arise until April 16th. Investigation into each phase of his testimony surely could have been made in this interval.

Lastly and most determinative is the fact that Dardi makes no showing on this appeal that the facts would have been other or different had he had an additional year or six months in which to prepare. Nor does he point even now to any facts which could have been developed which would have so radically changed the fact picture that, in effect, a new trial should be granted.

The Duration of the Trial

All the evils attendant to a long trial (February 27, 1962 to January 31, 1963) are stressed by appellants; the possibility of the jury being unable to remember the testimony given in the earlier stages of the trial, the jury's impatience in being deprived of the opportunity to attend to their own affairs, their expressed resentment at short court sessions, abandonment of any summer vacation plans and their restlessness over the long periods involved in court counsel colloquy.

There can be no scale by which to measure the proper length of a trial. See, e.g., *People v. Clemente*, 8 N. Y. 2d 1, 200 N. Y. S. 2d 625, 167 N. E. 2d 327, *cert. denied*, 364 U. S. 923 (1960). For the reasons specified and many other, long trials should be avoided. However, a multi-defendant stock fraud case, as involved as this one, usually necessitates delving into many financial transactions. Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jig-saw puzzle, only comes into vision by the assembling

of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole. Every defendant can claim and with much plausibility that his own role may have become besmirched by having been tried with others more guilty than he, and naturally every defendant feels that he is the least guilty, if guilty at all.

Two legal principles, however, must be honored. Those entrusted to make the laws have placed the crime of conspiracy on the books and it has not been repealed despite the fact that throughout the ages it has been largely responsible for multi-defendant trials and the admission of evidence otherwise inadmissible. Nor does any statute exist nor are there court decisions which declare a trial of more than one defendant at a time to be reversible error.

In any financial scheme of magnitude involving many persons and many companies it is but normal expectancy that there be many participants. If the Government honestly believes (and there is no proof here to the contrary) that many defendants have played a part in the conspiracy they may be and probably should be joined as defendants. Again a long-established legal principle contributes to this joinder, namely, that a defendant need not be a member of the conspiracy from its inception to its termination. Defendant co-conspirators in many instances need not even know their fellow conspirators or the particular part they are playing. If the indictment of the many original defendants contributed to the length of the trial, this fact does not constitute reversible error.

Colloquy

Appellants argue that they were deprived of a fair trial because of the extensive colloquy engaged in between court and counsel. They point to certain statistics, inserted in the record by the court itself, that after over eight months of trial the 19,544-page transcript contained 9,814 pages of

recorded testimony, 892 pages related to ancillary matters and 8,838 pages devoted to colloquy—practically 50 per cent testimony, 50 per cent colloquy. The trial was eventually to consume over eleven months and the transcript to extend over 26,000 pages.

By definition, colloquy is mutual discourse. In any litigation, but particularly where many defendants and many counsel are assembled, colloquy is indeed mutual and can, unless controlled, become overly extensive. The Dardi brief contains a twenty-four page analysis of the subject matter of the more extended colloquies. Each topic was related to some point, substantive or procedural, which one or more counsel believed to be of importance to his cause. The trial court was undoubtedly motivated by a desire to obtain the correct answer and to give counsel the benefit of expressing their views. However, is the trial transcript the place to have recorded the extemporaneous legal philosophies of counsel, philosophies frequently tinged by the exigencies of the moment and the character of the testimony sought to be admitted or excluded? Would it not be better to insist that trial counsel insofar as possible be prepared to justify their positions in written memoranda submitted to the court? The myriad of legal points which could be conjured up by resourceful counsel, if debated on the record in a long and complicated case such as this, would result in a legal treatise not unlike a hypothetical *Corpus Juris Tertium*. Using the statistics submitted to us, since half of the record in eight months was devoted to matters other than testimony, the jury was subjected to four months of enforced attendance at a debating contest. This is not to say that on occasion a brief statement of the grounds for objection or the reasons for the admission or exclusion of evidence may not be helpful to court and opponent but the dictation by counsel on the record of treatises tantamount to Law Review articles should be avoided.

Except for unduly protracting the trial, and we have already determined that length *per se* does not create reversible error, the colloquy itself does not disclose material of a prejudicial nature. Furthermore, the blame, if blame there be, must be shared by the court and all counsel. But this is not to say that a tighter rein by the Judge would not have resulted in a materially shorter trial. We have already said that the court has wide discretion in adopting methods which will expedite a trial and that there are occasions when it is wise for this discretion to be exercised. See *United States* v. *Agueci*, *supra*, at 841.

The Trial Court's Charge

1. Summation of Contentions

After an eleven months' trial, the trial court apparently believed that it would be of aid to the jury to summarize the facts. This summary occupied the first day of the two-day charge. Appellants attack the court's review of the parties' "contentions" as a distortion, more specifically, that they were not defendants' contentions but rather that "they were the prosecution's contentions of defense 'contentions.'" Only a careful analysis of the charge itself supplies the answer to the accusations that it was not impartial, that it was unfairly balanced, unfairly presented and unfairly emphasized or de-emphasized the positions of the defendants. To set forth any detailed refutation of these charges might well require a re-statement of the court's 450 page charge. Any such procedure would only add needlessly to the ever-expanding law reports. The conclusion from this court's analysis is that the charge was fair and that no reversible error can be attributed to the trial court's review of the facts or "contentions."

2. Legal Errors in Charge

In addition to the attack on the trial judge's summary of "contentions" in the charge, appellants assert that the

charge incorrectly stated the law in various respects. While specific sentences as excised from the overall context may have been unfortunate, we think it clear that when viewed in its entirety, the charge correctly stated the law.

Appellants claim that the trial court's instructions on the issue of appellants' guilty knowledge and criminal intent as to the substantive counts was tantamount to directing the jury to bring in a guilty verdict. They stress particularly the statement that in proving that a defendant acted knowingly and wilfully it was not necessary for the defendant to know that he was breaking "any *particular* law or any *particular* rule" (emphasis added); that the jury might consider the amount of profits made on a certain transaction and whether appellants had a pecuniary or financial interest in the outcome of the transactions.

While these statements taken separately may seem misleading, we believe that this portion of the charge, read as a whole, adequately informed the jury of the government's obligation to prove guilty knowledge. The Court said: "An act is wilful if it is done knowingly, deliberately and with an evil motive or purpose. . . . The significant fact is the particular defendant's state of mind." In its context the statement that the defendants need not have known they were breaking "any particular law" signified that they must be shown to have known their actions were illegal even if they did not know exactly which statute they violated. The Court then suggested criteria by which to evaluate the circumstantial evidence bearing on intent. Incriminating inferences, it suggested, might be drawn from documents which did not accurately depict the transactions they related to, from documents "made up, if you so find, to conceal what you regard as the actual facts in the transaction," from the use of dummy nominees and "of exchange checks to disguise the payment of money." Finally, in discussing the defendants' contention that they were protected by

their reliance on legal opinions, the Court charged that reliance on legal advice did not always constitute a complete defense; otherwise

> "regardless of the consciousness of wrongdoing on his part and perhaps on the part of his legal advisor, the advice of counsel would operate to confer immunity from punishment. Such is not the case.
>
> "However, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do, and if he fully and honestly lays the facts before his counsel and in good faith honestly follows that advice, relying upon it and believing it to be correct, and only intends that his acts shall be legal, he could not be convicted of a crime which involves wilful and unlawful intent even if the legal advice that he received was erroneous.
>
> "But, on the other hand, no man can wilfully and knowingly violate the law and attempt to excuse himself from the consequences by arguing that he followed the advice of counsel."

Furthermore this portion of the charge on requisite criminal intent[6] as to the substantive counts was supplemented by the statement made a few minutes earlier in the charge on the conspiracy count that "a knowing participation in a scheme having as an objective the knowing violation of the Securities Laws or the knowing violation of the Mail Fraud statute" was required.

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[6] There is some dispute whether knowledge of illegality of sale need be shown to satisfy the "wilfulness" requirement of the Securities Act if the seller knew that the stock was control stock and that it was not registered. See Loss, *Securities Regulation* 1086, 1309 and Supp. 1962 (discussing *United States* v. *Crosby*, *supra*). Since the charge was adequate on either view, we need not consider whether it gave the defendants an advantage to which they were not entitled.

The Court properly instructed the jury that the Rule 133 "merger" exemption from the registration requirements did not apply to a subsequent resale of the stock acquired in the United Dye Handridge merger. 17 C. F. R. § 230. 133; see *United States* v. *Crosby*, *supra*, at 939; *SEC* v. *Culpepper*, 270 F. 2d 241, 247-48 (2d Cir. 1959). Appellants assert that the trial court erred in refusing to charge the jury that it might consider the extent to which the application of Rule 133 was unclear in 1956. However, it is at best doubtful that appellants were entitled to such a charge, since there was no evidence that they in fact had been misled by an incorrect analysis of this exemption. Indeed, the opinion letters relied on by Berman correctly advised that the stock was freely tradeable only if the seller were not a control person. In any event, the trial court did remind the jury of appellants' contention that "they acted on the advice of lawyers, that they were told that Rule 133 exempts the stock, that they didn't know that the stock had to be registered."

We have carefully considered the other contentions pertaining to legal errors in the charge and have found them to be without merit.

General Unfairness and Admission of Prejudicial Evidence

Dardi asserts that the trial court's rulings evidenced an conscious discrimination against defendants, the cumulative effect of which requires reversal; in the alternative, he points to various rulings which by themselves are said to require reversal. The innuendo that the trial court did not carry out its judicial obligations is completely unfounded.

1. Shawano and Bon Ami

Much of Dardi's criticism of the integrity of the trial can be attributed only to the nature of the conspiracy itself. For example, Dardi contends that admission of evidence concerning Bon Ami and Shawano Development Corporation resulted in prejudicial error requiring reversal. On direct examination, Guterma was allowed to tell of a prior conviction under the Securities laws involving both Bon Ami and Shawano stock. See *United States* v. *Aronson*, 319 F. 2d 48, 51 (2d Cir.), *cert. denied*, 32 U. S. L. Week 3187 (U. S. Nov. 18, 1963). Thereafter, transactions involving each corporation were put before the jury. Thus, Guterma testified that $150,000 of the $450,000 which Garfield and Pasternak transferred to United Dye in exchange for the release of the "pipeline" guarantee was channeled through Kent Window Corporation, a subsidiary of Shawano. Bon Ami was scrutinized more thoroughly. The liquid assets of Bon Ami were thus shown to have been used to satisfy the $519,000 Murchison obligation and to enable United Dye to repay the short-term debt incurred when Bon Ami was acquired. In each instance the transaction was relevant to show the close relationship between Guterma, Garfield and Pasternak and the mechanics by which the major purpose of the conspiracy was effected. And, Dardi's cooperation with and proximity to the "executive" group during these dealings was "highly relevant to the issue of criminal intent and knowing complicity in the fraud and conspiracy." *United States* v. *Crosby*, *supra*, at 946.

2. The Deputy Marshal Incident

Appellants urge that the trial court erred in denying a mistrial when a Deputy United States Marshal, assigned to escort Dardi during court appearances, engaged in a brief conversation with a juror. The trial court carefully investigated the incident, determined that the juror had not

been influenced and gave cautionary instructions. Under the circumstances, the court's denial of the motion for mistrial was not an abuse of discretion.

3. The Mayers Letter and Stock Purchasers' Testimony

Appellants insist that there was error in allowing the jury to examine the "Mayers" letter, portions of which they characterize as anti-Semitic and vulgar. Since the offensive language did not refer to any of the appellants, it is difficult to see how prejudice resulted from this incident. Similarly, there is no merit in the contention that appellants were prejudiced by the testimony of the unfortunate purchasers of United Dye stock. Such testimony was relevant to numerous counts of the indictment.

4. Pleas of Guilty During the Trial

At the commencement of the trial, there were twelve individual defendants. After three weeks of trial, three pleaded guilty, including the defendant Garfield who had been closely associated with Gutterma in the financial schemes under attack. Some three months later another defendant, Braun, announced his intention to enter a guilty plea and subsequently became a Government witness. In July 1962 Pasternak, also prominently involved with Gutterma, pleaded guilty. Other guilty pleas were entered in July and September. Although taken in the jury's absence, the jury could not have been unaware of these pleas. Appellants argue that under these circumstances a fair trial was impossible and that "The presumption of innocence could not have survived the parade of guilty pleas and the recitations." Dardi recognizes this court's decisions in *United States v. Crosby, supra; United States v. Falcone*, 109 F. 2d 579 (2d Cir.), *aff'd*, 311 U. S. 205 (1940); *United States v. Rollnick*, 91 F. 2d 911 (2d Cir.

1937), but claims that the many guilty pleas from defendants tied in to the same conspiracy seriously prejudiced the remaining defendants.

Of course, in any multi-defendant trial, there is a real danger that the admission of guilt by one defendant, particularly in a conspiracy case or one in which the defendants have acted jointly, will react unfavorably against other defendants. However, no rule of law has yet been promulgated which forbids a defendant from so pleading during trial. This court as have courts of appeals in other circuits, has faced this problem and has held in conformity with "the federal courts [which] have uniformly held it not error, if proper cautionary instructions are given, for the jury to be informed during trial that one or more defendants have pleaded guilty, or even for the jury to be present when the pleas are entered." *United States* v. *Crosby*, *supra* at 948; see also *United States* v. *Aronson*, *supra*; *United States* v. *Murray*, 297 F. 2d 812 (2d Cir.), *cert. denied*, 369 U. S. 828 (1962); *United States* v. *Freeman*, 302 F. 2d 347 (2d Cir. 1962). The instructions given by the trial court after each plea, together with its comments on this subject in the charge, met the law's protective requirements.

IV.

Specific Errors

Restrictions on Lebrich's Cross-Examination

Dardi argues that the restrictions imposed upon the cross-examination of witness Lebrich was a denial of due process of law, and in the alternative, an abuse of discretion under the federal rule of the scope of cross-examination. Lebrich was an officer and director of United Dye and was Guterma's legal adviser. He was named as a co-conspirator, but was not a defendant. On its direct case,

the Government called Lehrich to give testimony concerning what the parties have characterized as the "Bender" affair. Because of the limited scope of the direct examination, the trial court refused to permit defense counsel to cross-examine on the events of 1955 and 1956.

The trial court was justified in the exercise of its discretion in limiting cross-examination to the scope of the direct. *United States* v. *Minuse*, 142 F. 2d 388, 389 (2d Cir.), *cert. denied*, 323 U. S. 716 (1944). Moreover, during Lehrich's cross-examination (cross-examination by Dardi's counsel covers some 250 pages of transcript), the court gave defense counsel "widest latitude to impeach Lehrich on such matters as bias, interest, hostility, special relationship to the government, and motivation to falsify, . . ." Cf. *United States* v. *Bentvena*, *supra*, at 940-41. In any event, the trial court advised counsel that if Lehrich was called as part of the defense case, he could be examined on the events of 1955 and 1956 as a hostile witness. Having failed to avail himself of this opportunity, Dardi cannot now complain.

The "Bender" Affair

To show Dardi's "consciousness of guilt," the Government adduced testimony involving an attempt to quash a SEC investigation of United Dye through the intercession of former Senator George Bender, then Special Assistant to the Secretary of the Interior. Dardi argues that there was a failure of proof in regard to the "Bender" episode which resulted in substantial prejudice.

The "Bender" affair was alluded to first in the Government's opening and was developed in more detail during Guterma's direct examination. While Guterma's testimony on this matter was restricted to Dardi, the only participant remaining in the case, he was completely exonerated by Guterma's account, and the jury was thoroughly instructed

to that effect. Thereafter, Lehrich testified in substance that he had told Dardi of a conversation he had had with Garfield in which Garfield had spoken of a commitment for $100,000 which he (Garfield) had with Bender; that Guterma was obligated for $30,000 of the commitment and Dardi for $20,000; that Garfield would like them to meet their obligations; that Dardi said that he had made such a commitment but was out of funds at the moment but that he would talk to Garfield about it. Lehrich then told of a previous conversation in which Garfield had said that Bender might be helpful in connection with a pending SEC investigation; that Garfield said that he told Dardi, Guterma and Eveleigh of his projected trip to Washington to see Bender and that he had seen Bender.

There was no failure of proof. Lehrich's testimony, if believed, might well have been sufficient to have implicated Dardi. And in view of the trial court's adequate and specific direction to the jury that the Bender episode was being offered only as to Dardi, the conclusory claims of prejudice by the other appellants are without merit.

The Prosecutor's Comments on Summation as to Cumulative Testimony

Error is asserted in the court's refusal to grant Dardi's motion for a mistrial because of the prosecutor's statement in summation that Lehrich and Eveleigh if called would have testified cumulatively to Guterma. Apparently the prosecutor felt piqued to make this comment because of references in the summation of defense counsel to the failure of the prosecution to call them as witnesses. Counsel for the prosecution and the defense definitely should not put forward their own views as to the possible testimony of witnesses not called or tell the jury their own reasons for not calling them. However, here the jury had adequate affirmative testimony to support its verdicts and the prose-

cutor's comments under the circumstances do not constitute reversible error.

Berman's Inspection of Prior Testimony

Upon Berman's cross-examination, the Government read various questions and answers from Berman's prior testimony to the SEC and the Stock Fraud Unit of the office of the Attorney General of New York. While counsel was permitted to examine each question and answer, the court did not allow counsel to read the transcripts as a whole or those portions surrounding the questions and answers alluded to. At the completion of cross-examination, the court took it upon itself to read both transcripts "for the purpose of finding out whether there is any material or relevant qualifying or explanatory context of the questions and answers . . . used."

In *United States* v. *Stone*, 282 F. 2d 547, 552 (2d Cir.), *cert. denied*, 364 U. S. 928 (1960), this Court affirmed the proposition that "when the prosecution uses testimony of a defendant before the grand jury, the defendant must be allowed to inspect it." See *United States* v. *Cotter*, 60 F. 2d 689 (2 Cir.), *cert. denied*, 287 U. S. 666 (1932). In *Stone*, where the Court did not examine the transcript, this Court on appeal reversed the conviction on one count since it was not certain that the grand jury transcript which this Court had examined would not have been "far more effective than what the trial jury may well have regarded as an invented and self-serving explanation of the inconsistency." In *Cotter*, however, the trial court did read the transcript; and, because appellants there "chose to rest upon the bare denial of their right" and had shown no prejudice, the convictions were affirmed.

Here, as in *Cotter*, there is no showing of prejudice. Berman eventually did obtain a copy of his SEC testimony, although from a source other than the trial court or prose-

cutor, in such time that he might have used it had he so desired. As to the Attorney General's transcript, it appears from the record that Berman abandoned his requests to examine it personally. He was not entitled to the full transcript until the Government used it on cross-examination. See *United States* v. *Murray*, *supra*, at 821. When the request was first timely made, after cross-examination, the trial court suggested that Berman raise the matter again. Although Berman thereafter pressed for the SEC material, no further demand was made for the Attorney General's transcript. Berman expressed his appreciation to the trial court for undertaking to read the transcript, but did not inquire later as to what the trial court's reading had disclosed. Under these circumstances, it is clear that Berman seeks to take advantage of circumstances which arose due to his own inaction. His claim does not merit reversal of his conviction.

Assignment of Counsel for Rosenthal

Rosenthal argues that the trial court's failure to adjourn the trial because of his counsel's illness, and its subsequent assignment of a co-defendant's counsel requires reversal. Examination of the events surrounding Rosenthal's original counsel's disability, his unsuccessful efforts to secure another counsel willing to proceed without an inordinate continuance and the arrangements finally made lead to the conclusion that the trial court's treatment of the matter was entirely reasonable under the circumstances, and that Rosenthal suffered no prejudice. Rosenthal had a month's notice that his lawyer's health was questionable. His original counsel was available for consultation with his replacement. His defense had not been unduly complicated. The trial court, therefore, properly refused the continuance of "at least a month and a half to two months" requested by the lawyer Rosenthal selected. Rosenthal was unable to make satisfactory financial arrange-

ments with other counsel; consequently, the court appointed the counsel of another defendant, Cornelius De Vroedt, Inc., who had also represented the individual defendant DeVroedt prior to his severance due to illness. Rosenthal, Cornelius DeVroedt and the DeVroedt Corporation were charged with "substantially the same acts," and the Court specifically found that the assignment would not give rise to a conflict of interests; but indicated that if a conflict were to arise, the appropriate precautions would be taken.

While the right to counsel is absolute, its exercise must be "subject to the necessities of sound judicial administration." *United States* v. *Arlen*, 252 F. 2d 491, 494 (2d Cir. 1958); and where there appears to be no conflict, the court may, in its discretion, assign to a defendant the attorney of a co-defendant. See, *e.g.*, *Banziger* v. *United States*, 161 F. 2d 299, 301 (9th Cir.), *cert. denied*, 332 U. S. 769 (1947). Such an assignment is not, in itself, a denial of effective assistance of counsel. Since *Glasser* v. *United States*, 315 U. S. 60 (1942), it has been clear that some conflict of interest must be shown before an appellant can successfully claim that representation by an attorney also engaged by another defendant deprived him of his right to counsel. See *United States* v. *Bentvena*, *supra* at 937 and cases there cited. During the Government's direct examination of Barkley, there arose the possibility that a conflict of interest might occur during cross-examination. At that point Cornelius DeVroedt, Inc. entered a plea of *nolo contendere* and was severed, thus removing any possible conflict.

Rosenthal makes the further argument that the trial court improperly denied his request to put a series of "exculpatory" questions to a former salesman who had invoked the Fifth Amendment. This argument proceeds on an erroneous notion of evidence that may be submitted for the

jury's consideration. An attempt to influence the jurors in the manner suggested was correctly rejected by the trial court.

Impeachment of Witness McCollom

McCollom was a defense witness called to rebut Brann's testimony. He testified that Brann's reputation in Geneva, Switzerland, for truth and veracity was "just as poor as it could possibly be." On cross-examination, the prosecution asked McCollom whether or not there was a warrant of arrest outstanding against him in Switzerland for embezzlement of $50,000. Apparently, the Government sought to show that McCollom was motivated to lie about Brann because Brann had been responsible for bringing the embezzlement charges. However, McCollom denied that an arrest warrant existed and the Government was prevented from pursuing the inquiry. Dardi relies on *Michelson v. United States*, 335 U. S. 469 (1947), in urging that the Government's inquiry requires reversal. That case, however, concerned the use of evidence of a prior conviction after the defendant had placed his character in issue. Here, the question was aimed at impeaching a witness' credibility by showing his hostility and bias. While an arrest alone is not normally admissible to impair the credibility of a witness, the fact that it might have embittered him so as to motivate him to testify as he has may be relevant. In any event, the incident complained of, when viewed in context, was not so prejudicial as to require reversal.

Timm's Appearance Before the Grand Jury and During the Trial

Reversible error is attributed to the prosecutor's acts in calling Alexander Timm, Dardi's former personal secretary and an officer and director of United Dyes, before the Grand Jury. The reason advanced by the prosecutor

for this action was that Timm's testimony was relevant to a possible conspiracy to obstruct justice. Dardi in turn claims that the prosecutor was only using this reason as a subterfuge to gather valuable evidence and to put pressure on Timm so as to obtain information and leads for use on the trial.

The merits of these conflicting contentions were carefully considered by the trial court in a seven-page opinion dictated into the record, denying a defense motion for a mistrial and the suppression of evidence. The trial court read Timm's Grand Jury testimony, properly recognized the principle of law that "It is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial" and came to the conclusion that under the particular facts before it (no useful purpose will be served by outlining the Government's futile subpoena efforts) "the Grand Jury's inquiry into a possible conspiracy to obstruct justice was conceived and carried out in good faith and in a manner that did not prejudice the complaining defendant," and that Timm's Grand Jury subpoena did not constitute "the use of a Grand Jury as a subterfuge to elicit testimony for use at this trial." Under all the circumstances, this conclusion must be sustained.

The jury had full opportunity to hear the explanations advanced by capable counsel during most extensive summations in complete exculpation for appellants' every act. The four days required by the jury to reach their verdicts scarcely bespeak a snap judgment. In final analysis, the resolution of the facts and the inferences to be drawn therefrom were for jury decision. After consideration of all the many assertions of error, none of the points, individually or collectively, demonstrate that the defendants were deprived of a fair trial.

Judgments affirmed.

Statutes Involved

UNITED STATES CONSTITUTION

Art. 1, § 9, Cl. 3:

Bill of attainder and ex post facto laws. No Bill of Attainder or ex post facto Law shall be passed.

Amendment V:

No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 15, United States Code

77e Prohibitions relating to interstate commerce and the mails.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; * * *

77x Penalties.

Any person who wilfully violates any of the provisions of this subchapter, or the rules and regulations

promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years.

Title 18, United States Code

2 Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

371 Conspiracy to Committ Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure

Rule 8. Joinder of Offenses and Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the

same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of March one thousand nine hundred and sixty-four.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAMUEL S. GARFIELD, et al.,
Defendants,

VIRGIL D. DARDI, CHARLES ROSENTHAL, ROBERT B. GRAVIS, CHARLES M. BERMAN,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

A true copy,
A. DANIEL FUSARO,
Clerk

[SEAL]